Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

87 1381

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH B. MARGOLIN,

Petitioner,

v.

BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

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QUESTIONS PRESENTED

1. May an aggrieved party be denied the use of an independent statutory appeal under Sec. 310 of the Education Law of New York where such denial results in the confiscation of a property right without due process of law?

2. May the public policy of a state supercede the provisions of the United States Constitution and federal law flowing therefrom where said public policy has resulted in the denial of a property right without due process of law?

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York (App. A at 1a) [1] reversed with costs the order of the Appellate Division, Third Department (App. B at 48a to 50a) and annulled the determination of the Commissioner of Education of the State of New York dated April 30th, 1985 (App. B at 55a to 64a). The opinion of the Court of Appeals is reported at 70 N.Y.2d 501 (1987). The opinion of the Commissioner of Education is reported at 24 Ed.Dep.Rep. 423 (1985). The opinion of the Appellate Division, Third Department is reported at 121 A.D.2d 136 (1986).

JURISDICTION

The opinion of the Court of Appeals was rendered on November 19th, 1987 and was

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[1] Numbers in the parentheses refer to pages of the petitioner's appendix filed herein.

filed on November 19th, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257[3].

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article VI, clause 2, (App. E at 120a)

United States Constitution, Amendment XIV, Section 1 applicable part , (App. E at 120a)

N.Y.S. Administrative Procedure Act Sec. 100 (McKinney), (App. E at 126a)

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8 NYCRR 80.2(c), (App. E at 129a)

STATEMENT

The Court of Appeals of the State of New York has denied your petitioner herein standing to appeal to the Commissioner of Education of the State of New York under Education Law Sec. 310 (App. E at 123a-124a) from the decision of the respondent herein. This has resulted in the deprivation of the petitioner's seniority rights by the respondent without due process of law in violation of the provisions of the Constitution of the United States (App. E at 120a).

The petitioner herein, Joseph B. Margolin ("Margolin") , is a certified secondary level Social Studies teacher continuously employed by the respondent Board of Education, Commack Union Free School District ("District") for the past nineteen years. Margolin has been duly tenured for the past sixteen years.

Your petitioner is a graduate of an A.B.A. accredited law school but is not admitted to practice law in any jurisdiction whatsoever. The petitioner is appearing Pro se herein.

A collective bargaining agreement has been in existence between the Commack Teachers Association ("CTA") and the District for the period from July 1st, 1984 through and including June 30th, 1986.

Margolin was involuntarily assigned outside of his certification to teach a non-Social Studies class daily entitled

"Writing and Reading" for the school year 1984-85 under the supervision of the English Department of Commack High School South and for the 1983-84 school year he was involuntarily assigned to the non-Social Studies assignment entitled "Resource Room" under the supervision of the department chairperson of the Special Education Services Department at Commack High School South.

Margolin is the only member of the Social Studies Department so involuntarily assigned for two [2] consecutive years.

These teaching assignments were made in violation of Sec. 18.01 k of the said agreement. (App. D at 67a).

The violation thereof by the District occurred by reason of the fact that at the time of such misassignments there were at least five [5] Social Studies teachers who had less seniority than Margolin

and none of whom had any involuntary assignments outside their Social Studies area of certification.

In accordance with the grievance procedures provided for in the collective bargaining agreement (App. D at 68a to 74a). Margolin proceeded to grieve the involuntary assignment to "Writing and Reading". In compliance with the first step of the procedure Margolin presented his grievance in writing to the CTA (App. D at 75a). In response thereto Margolin was informed that the CTA representative met with his immediate supervisor and with the school principal. Margolin was further informed by the CTA that his grievance had been denied by his immediate supervisor without explanation.

Following the exchange of communications with the CTA, the CTA informed Margolin that they made a careful investiga-

tion and found Margolin's grievance to be without merit. (App.D at 79a). Margolin was further informed that the CTA would no longer represent him and that your petitioner was thereafter free to exercise all of the steps of the grievance procedures of the collective bargaining agreement. (App.D at 115a), which were available to Margolin without any CTA representation whatsoever. The CTA refused to represent Margolin irrespective of the contractual, statutory, and regulatory violations committed by the District in making the involuntary out-of-certification assignments to Margolin complained of.

Margolin's seniority rights have been created by virtue of the operation of Education Law Sec. 207 (App.E at 125a) as more particularly promulgated by 8 NYCRR Sec. 30.1[f] (App. E at 129a).

The violation by the District of my

seniority rights is the very gravamen of my grievance. Your petitioner's seniority rights which are statutorily created and contractually protected have been obliterated thereby.

The out-of-certification assignments made by the District are in violation of the Education Law of New York in several respects. The District violated Sections 3001, 3009[1] and 3010 of the Education Law. (App. E at 127a to 128a).

Pursuant to Education Law Sec. 305 (App. E at 122a) the Commissioner is charged with the duty of enforcement of these and all laws related to Education in New York and executing educational policy.

The District further failed to obtain the requisite approval from the Commissioner prior to the making of the out-of-certification assignments to your petitioner herein. Sec. 80.2(c) of the

Regulations promulgated by the Commissioner requires that the District obtain from the Commissioner, his approval for the assignment of Margolin to teach the course entitled "Writing and Reading" which is a subject not covered by his license for a period not to exceed five [5] classroom hours per week. (App. E at 129a).

Your petitioner proceeded through each step of the grievance machinery available to him under the collective bargaining agreement. His grievance was denied at all three stages. (App.D at 81a to 100a). The fourth stage of the grievance process, that of external arbitration by the Public Employment Relations Board (App.D at 72a to 73a) was not available to Margolin for no such right whatsoever is accorded him by the terms of the collective bargaining agreement. Only the written demand therefore by the District

or by the CTA which was never forthcoming could have made arbitration available to Margolin.

Following the unsuccessful exhaustion of the grievance procedures available to Margolin under the said agreement and following the declination by the CTA to pursue binding arbitration available under the said agreement, your petitioner herein appealed to the Commissioner pursuant to Education Law Sec. 310[7]. (App.E at 124a).

My appeal to the Commissioner was sustained in all respects. (App.C at 55a).

The District commenced an Article 78 proceeding under N.Y.C.P.L.R. Sec. 7803 (App. E at 128a) with its Notice of Petition dated August 12th, 1985. The petition sought to annul the determination of the Commissioner dated April 30th, 1985 (App. C at 55a-64a). Said de-

cision was rendered by the Commissioner pursuant to Sec. 310 of the Education Law (App.E at 124a) sustaining in all respects the appeal taken to him by the petitioner herein.

Margolin, who is an aggrieved party within the purview of Sec. 310 challenged his involuntary assignment to teach a non-Social Studies class entitled "Writing and Reading" daily during the 1984-85 school year and his involuntary assignment prior thereto to the non-Social Studies class entitled "Resource Room".

The appeal to the Commissioner specifically alleged that said assignments were in violation of Sec. 18.01[k] of the collective bargaining agreement.

The Answer interposed by Margolin in the Supreme Court of Albany County denied the material allegations of the District's

petition and raised the following:

> [a]nd claiming further that the denial of his grievance at all three internal stages of the grievance process failed to afford justice and equal protection to the Respondent.
>
> (App.D at 110a).

Your petitioner further enunciated this point in his affidavit in support of his Answer annexed to the Verified Answer when he defended his right for an independent appeal to the Commissioner. (App.D at 111a to 113a).

The issue of due process was first raised by Margolin in his Verified Petition to the Commissioner. (App.D at 102a 106a).

The Commissioner sustained Margolin's independent appeal pursuant to Sec. 310 with particular reference to the unavailability of arbitration to Margolin and his right to have his grievance heard in

another forum, that of the Commissioner. (App. B at 60a.

In the proceedings commenced by the respondent herein for a judicial review of the Commissioner's decision, the Supreme Court of Albany County dismissed the District's petition. (App. B at 51a to 54a).

Subsequent thereto the District appealed from the order of the Supreme Court to the Appellate Division, Third Department. Margolin again asserted his right to an independent forum to hear his grievance under Sec. 310. Said point was raised on pages 11 and 12 of his brief. (App. D at 118a).

In its order dated January 5th, 1987 the Appellate Division affirmed the judgment of the Supreme Court (App. B at 48a to 50a) and in its decision dated December 24th, 1986 the Appellate Division went to great length to justify Margolin's right

to appeal to the Commissioner under Sec. 310 particularly where "rights are implicated by official acts of school authorities." (App. B at 36a)

The District thereupon appealed to the Court of Appeals of the State of New York. Margolin repeated and reiterated his right to due process under Sec. 310 in his brief on page No. 10 thereof (App. D at 119a) and more particularly on page No. 11 where he asserted the following:

> [M]argolin's seniority status is a property right and may not be confiscated or disregarded without due process of law.

The Court of Appeals reversed the decision of the Appellate Division denying your petitioner standing under Sec. 310 with respect to the claim of a deprivation

of his statutorily created and constitutionally protected seniority rights. (App. A at 1a to 26a).

It is from this decision that I petition this Court for a writ of certiorari to the Court of Appeals of the State of New York.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals of the State of New York denying the petitioner herein standing under Sec. 310 of the Education Law of New York and further annulling the determination of the Commissioner of Education has resulted in a confiscation of the petitioner's seniority rights without due process of law and is repugnant to the Constitution of the United States.

The interpretation of Sec. 310 of the Education Law by the Court of Appeals denying the petitioner herein due process

of law is unconstitutional, not on its face but on its application with respect to the petitioner. Poindexter v. Greenhow, 114 U.S. 270, 295 (1884).[2] This Court has spoken clearly in the past where the enforcement of a state statute and not the statute by its terms results in a violation of a constitutional right.

> It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court.
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> General Oil Co. v. Crain, 209 U.S. 211, 228 (1908).

The immediate result of the decision of the Court of Appeals in the case at

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[2]The constitutionality of Sec. 310 of the Education Law is drawn into question and 28 U.S.C. Sec. 2403(b) may be applicable. The petition herein shall be served on the Attorney General of New York.

bar, which reversed the prior decisions of the Supreme Court of Albany County and the Appellate Division, Third Department affirming the determination of the Commissioner of Education, was the reinstatement of the decision of respondent herein. It is the decision of the respondent, who conducted the last stage of the internal grievance machinery pursuant to Sec. 32.16 [c] of the collective bargaining agreement, that has been restored to full force and effect by the decision of the Court of Appeals.

The last stage of the grievance procedure was conducted by Forrest McMullen, the designee of the superintendent of the respondent and also the assistant superintendent of the respondent herein. Both the superintendent and McMullen are contractual employees of the respondent herein who serve at the discretion of the re-

spondent pursuant to the terms of the contract and are not tenured in accordance with the Education Law of New York and the rules and regulations promulgated by the Commissioner of Education. N.Y. Educ. Law Sec. 1711[3] (McKinney); Part 30 of the Rules promulgated by the Commissioner of Education; Matter of Coates v. Ambach, 52 N.Y.2d 261 (1976).

The appeal by Margolin from the decision of Forrest McMullen dated December 3rd, 1984 was taken pursuant to Sec. 310 [7] of the Education Law reading as follows:

> Any party conceiving himself aggrieved may appeal by petition to the commissioner of education, who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action:

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter or any other act pertaining to common schools. (Emphasis supplied.)

In New York the Commissioner of Education is an independent constitutionally created entity within the governmental structure of the State of New York with broad control over education. N.Y. Const. Art. 5, Sec. 4. The control and management of educational affairs is vested in the Board of Regents and in the Commissioner of Education. The determination of the Commissioner unless patently violative of statutory or constitutional mandate is beyond the range of judicial supervision. Board of Education of Northport-East Northport Union Free School Dist. v. Ambach, 90 A.D.2d 227, 458 N.Y.S.2d 680, aff'd. 60 N.Y.2d 758, 469 N.Y.S.2d 669, 457 N.E.2d

775 (1982).[3]

The constitutional mandate of the Commissioner of Education is further found in Sec. 309 of the Education Law which provides, as follows:

> The schools of every union free school district and of every city in all their departments

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[3] It is interesting to note that in its decision dated November 19, 1987 the Court of Appeals describes the authority and jurisdiction of the Commissioner but fails to cite the most recent and explanatory of its decisions in that regard, which is cited above. No specific repudiation of the Bd. of Education of Northport, supra is found in the decision herein being reviewed. In addition there have been no amendments to the Constitution of the State of New York nor statutory enactments abridging the authority vested in the Commissioner under Sections 309, 310, and 311 of the Education Law. The last modifications of Sec. 310 and the Commissioner's authority in this regard occurred in 1976 and were found to be of limited impact. James v. Board of Education, 42 N.Y.2d 357 (1977). Modification of Sec. 310 in 1976 was accomplished through legislative enactment. For reasons best known to the Court of Appeals, it has chosen the instant case in which to abandon its own precedent and rights guaranteed under the Constitution of the United States.

> shall be subject to the visitation of the commissioner of education. He is charged with the general supervision of their boards of education and their management and conduct of all departments of instruction.
>
> (App. E at 124a).

The purpose of the provisions of the New York State Constitution and the general legislative fabric make all matters pertaining to the public school system within the authority and control of the Department of Education of the State of New York. In this manner, controversies pertaining thereto are removed as far as practicable from the courts and decided within the appropriate sphere of governmental expertise. The decision of the Court of Appeals in the case at bar flies in the face of this rationale. Instead of allowing the expertise of the Commissioner to decide the issues in the

instant case, the Court of Appeals has relinquished this authority to the respondent herein, which created the substance of the grievance complained of by the petitioner.

The Commissioner is empowered by the Constitution of the State and statutory enactment to substitute his judgment for the acts of the officers of public school districts whose actions he has reviewed upon appeal. Matter of McNamara, 80 A.D. 2d 660 (3rd Dept. 1981); N.Y. Educ. Law Sec. 309 (McKinney). (App. E at 124a).

Section 311 of the Education Law designates the Commissioner as sole determinator with respect to the interpretation and implementation of Sec. 310. This includes the authority to determine the standing of petitioners seeking protection thereunder. Said section reads in part as follows:

> Powers of commissioner upon appeals or petitions, et cetera
>
> The commissioner in reference to such appeals, petitions or proceedings, shall have power:
>
> 1. To regulate the practice therein.
>
> (App. E at 124a).

Simply put, Sec. 310 is the statutory conduit for procedural due process that can be utilized by petitioners qualifying as aggrieved parties under the express terms of the statute and the interpretive case law. Your petitioner herein is such a party.

The petitioner herein, Joseph B. Margolin, appealed to the Commissioner pursuant to Sec. 310. Margolin had exhausted all prior grievance procedures available to him. The grievance, as described above, resulted from the respondent's involuntary assignment of Margolin to teach an English

course in violation of his statutorily created and contractually protected seniority rights (App.E at 125a and 129a). and in further violation of Sections 3001, 3009, and 3010 of the Education Law and Regulation 80.2(c) of the Rules and Regulations promulgated by the Commissioner (App.127a to 129a).

Margolin's seniority status is a property right to which he has a legitimate claim of entitlement and which may not be confiscated or disregarded without due process of law. Board of Regents v. Roth, 408 U.S. 564, 577. Due process of law requires a proceeding to be held before a neutral and detached hearing officer absent any pecuniary interest whatsoever. Gibson v. Berryhill, 411 U.S. 564, 579 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972). Certainly the reinstatement by the Court of Appeals of a de-

cision made by the respondent herein of a grievance against said respondent must be suspect when viewed through the standard enunciated by this Court in Gibson, supra and Ward, supra.

The Commissioner of Education in his decision dated April 30th, 1985 accepted without qualification that Margolin qualified under the statute for an appeal of the decision made by the respondent and dated December 3rd, 1984.

> Petitioner may, however, maintain an appeal to the Commissioner of Education pursuant to Education Law section 310 to enforce rights he may have under the collective bargaining agreement (Matter of Martz, 18 Ed. Dept.Rep. 508). In this instance, petitioner has exhausted the administrative remedy available to him by filing a grievance pursuant to the collective bargaining agreement, and has been unable to advance to the next step, arbitration, because his union declined his request to do so. It is undeniable that petitioner has

> pursued his available remedy to the extent possible and may now seek relief in this forum.
>
> (App. B at 60a).

In order to have the standing required under Sec. 310 and accepted by the Commissioner pursuant to his constitutional and statutory authority, Margolin had exhausted the prior stages of the grievance procedures available to him provided for in the collective bargaining agreement. (App. B at 60a).

These stages did not afford Margolin due process of law because his grievance in the first stage was heard and denied by the Social Studies Chairperson, who made the assignment complained of. In the second stage Margolin sought a review and reversal thereto by the principal, who expressly or by implication approved the assignment made by her subordinate. Said

principal was in the first year of employment by the respondent and was not tenured. In Stage No. 3 thereof, your petitioner sought a review and disaffirmance of the actions of the Chairperson and Principal by the District Superintendent who exercised supervisory responsibility over both of the said subordinates whose actions complained of must be deemed to have been ratified, approved and confirmed by him. Said Superintendent is a non-tenured contractual employee serving at the discretion of the respondent.

The Commissioner found that Margolin's seniority rights had in fact been violated by the respondent. (App.B at 63a) . The petitioner's seniority status is a property right and may not be confiscated or disregarded without due process of law. Board of Regents v. Roth, 408 U.S. 564, 577. The contractual and

and statutory violation has thus impaired Margolin's rights to his personal damage and detriment demonstrating that he is an aggrieved party under Sec. 310.

> It is well settled that an individual may maintain an appeal under Education Law Sec. 310 only if he is aggrieved in the sense that he has suffered personal damage or impairment of his rights. (citations omitted.)
>
> Matter of Novits, 18 Ed.Dept. Rep. 461 (1979)

The Court of Appeals in denying standing to Margolin has acted in contradiction to the case law defining and qualifying standing requirements thereunder.

The Commissioner has acted in so determining the parameters of standing pursuant to his statutory mandate. N.Y. Educ. Law Sec. 311 (McKinney). It is ironic that the Court of Appeals has denied Margolin standing and accepts the position of the respondent, who, in fact, has cited case

law in support of their position in the proceedings in New York wherein the aggrieved parties are teachers appealing under Sec. 310. Furthermore, these teachers are appealing to the Commissioner while being employed under the terms of a collective bargaining agreement.[4]

Perhaps the most vivid example of the inconsistencies of the respondent's position, which position was adopted by the Court of Appeals, was highlighted in the appellate proceedings commenced by the respondent in the Supreme Court of Albany County. The respondent cited a case[5] brought before the Commissioner under

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[4] Matter of Whyte, 19 Ed.Dept.Rep. 23 (1979); Matter of Roberts, 20 Ed.Dept.Rep. 88 (1980); Matter of Blumenfeld, 21 Ed.Dept. Rep. 236 (1981).

[5] App. D at 116a to 117a and 107a)

PLEASE NOTE THAT PAGES 30 AND 31 HAVE BEEN INVERSELY INSERTED HEREIN.

Sec. 310, Matter of Whyte, 19 Ed.Dept. Rep. 23 (1979), which mysteriously disappeared from the respondent's citations in subsequent levels of the appellate proceedings. In this case, the petitioner is a teacher employed by the respondent under the terms of a collective bargaining agreement. He commenced a grievance under the terms of the collective bargaining agreement with respect to the impairment of a right thereunder. The petition in that case was dismissed because the petitioner had not completed the contractual procedures nor shown that his union had refused to proceed with arbitration, a fact that Margolin has demonstrated clearly in the case at bar. (App.D at 79a-80a). The petitioner's standing in Whyte was unquestioned.

In effect, the decision of the Court of Appeals denying Margolin's use of Sec.

310 is not only a denial of due process of law but is also a decision inconsistent with the terms and provisions of the statute and the weight of case law interpretation therein. It should be noted that it was the Court of Appeals which clearly enunciated the authority of the Commissioner when it stated the following:

> In appraising the judicial nature of the act of the Commissioner of Education, it must be remembered that he combines both judicial and administrative functions. When he decides appeals where he has occasion to construe statutes, he undoubtedly acts in a judicial capacity. But in passing upon the propriety of educational policy by a particular school board or school district, he acts in a broader capacity than the courts, by reviewing at times administrative acts of discretion of which a court would refuse to take cognizance. * * * This is merely a reaffirmation of a principle contained in New York law for over 130 years. (citations omitted.)
>
> Matter of Vetere v. Allen, 15 N.Y.2d 259, 260 (1965)

The annullment by the Court of Appeals

of the decision of the Commissioner, which totally sustained Margolin's appeal of the respondent's acts and subsequent decision, is the result of an interpretation of Sec. 310 that is repugnant to your petitioner's rights under the 14th Amendment to the Constitution. A decision made by the respondent, in favor of the respondent and based on a complaint against the respondent, is now the rule in the case at bar.

2. <u>The decision of the Court of Appeals requires your petitioner to satisfy a condition precedent not heretofore expressed or implied with respec to Sec. 310 in order to avail himself of the protections thereunder.</u>

The Court of Appeals has erroneously accepted a standard found in the authorities cited by the respondent. The cases referred to by the respondent are plenary

actions for damages and do not represent independent statutory appeals to the Commissioner of Education by aggrieved parties resulting from deprivations of property rights.[6] The cases cited by the Court of Appeals with respect to the standard they seek to require of Margolin in order for him to utilize Sec. 310 are distinguishable, inapplicable, and uncontrolling. It is important to note that the Appellate Division, Third Department, which affirmed the decision of the Com-

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[6] Berlyn v. Bd. of Ed., 80 A.D.2d 572 (2nd Dept. 1981), aff'd., 55 N.Y.2d 912 (1982); Chupka v. Lorenz-Schneider Co., 12 N.Y.2d 1 (1962); Menkes v. City of New York, 91 A.D.2d 654 (2nd Dept. 1982); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Vaca v. Sipes, 386 U.S. 171 (1967); Civil Service Bar Assoc., Local 237 v. City of New York, 64 N.Y.2d 188 (1984). The Court of Appeals has unfortunately confused the the standards required in private sector labor plenary actions with the requirements to be an aggrieved party under Sec. 310 of the Education Law.

missioner, noticed this fact when they wrote in the majority decision that:

> We find petitioner's cited authorities inapplicable to the instant situation as we read them more narrowly than proposed by petitioner.
>
> (App. B at 36a).

When the respondent asserted that Margolin must show his union's breach of its duty of fair representation in order to avail himself of Sec. 310, the Commissioner correctly responded in his decision by noting the longstanding fact that the Commissioner does not have jurisdiction over such organization. A public employee union and its officers thereof are not officers or school authorities as such terms are used in Sec. 310[7] of the Education Law. (App. B at 59a).

The Court of Appeals has adopted a standard and threshold requirement for Margolin's use of Sec. 310 that was pro-

posed by the respondent who cited a case entitled Matter of Seidenberg[7] and misread the text therein. The petitioner informed the Court of Appeals of the respondent's error.[8] That apparently did not affect the court's decision to adopt a line of reasoning derived from the misreading of a case.

It is even more perplexing that the Court of Appeals has required Margolin to show a breach of a union's duty of fair representation in utilizing an independent statutory appeal under Sec. 310 when such

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[7] Matter of Seidenberg, 15 Ed.Dept.Rep. 291 (1976)

[8] The following footnote No. 3 appeared in Margolin's brief before the Court of Appeals: "The appellant's summary of the fact situation in Seidenberg is in error. The case does not report that the assistant principal was a member of the organization seeking to censure him nor that the censure resulted from an internal disciplinary proceedings against him."

a standard is not even required in New York in plenary actions where damages are sought from the alleged deprivation of seniority rights. To this effect see Dobkowski v. Amalgamated, Etc., Employees of America, 166 Misc. 277 (Sup.Ct., Queens) 1937.

In effect the Court of Appeals has erected a threshold requirement for Margolin that must be met before an appeal before the external forum, the Commissioner, will be entertained. This must occur irregardless of the meritorious nature of the grievance. Such an implied construction of Education Law Sec. 310 is repugnant to the Constitution and is a denial of due process of law. The situation is made more egregious by the admission of the Commissioner that he lacks the jurisdiction to determine whether a union has breached its duty of fair representation to a

petitioner.

3. The public employee organization representing the petitioner refused to accept his grievance and thus foreclosed his utilization of arbitration by an impartial party in an independent forum. (App. D at 79a and 72a). The petitioner herein was unable to compel his union to employ contractual grievance machinery for the protection of his seniority rights without demonstrating that the union breached its duty of fair representation. Margolin v. Commack Teachers Assn., 18 PERB Sec. 4637.

A public employee labor organization in New York need not take a meritorious grievance brought by an aggrieved party under its auspices subject to the terms and provisions of a collective bargaining agreement. The duty of fair representation is violated only when the employee

organization's decision not to take a grievance is grossly negligent, irresponsible or improperly motivated. Nassau Educational Chapter of the Syosset CSD Unit, CSEA, 11 PERB Sec. 3010 (1978).

4. The decision of the Court of Appeals precludes the petitioner from exercising his rights to an appeal before the Commissioner of Education from the official acts of the respondent by holding that the exercise of such remedy would jeopardize the public policy of the State of New York that encourages the harmonious and cooperative relationship between parties to a public employment collective bargaining agreement.

The public policy cited by the court is inapplicable to the case at bar as the petitioner herein does not seek to subvert or circumvent a provision of a public employment collective bargaining

agreement providing an exclusive contractual remedy therein. In fact, the collective bargaining agreement provides to the contrary:

> 32.01 In order to establish a more harmonious and cooperative relationship between the Board and its employees, which will enhance the educational program of the District, it is hereby declared to be the purpose of these procedures to provide a means for orderly settlement of differences, prompt and fairly, as they arise and to assure equitable and proper treatment of employees pursuant to established rules, regulations and policies of the District. The provisions of these procedures shall be liberally construed for the accomplishment of this purpose. (Emphasis supplied.)

Furthermore the case law of New York is replete with instances where teachers under collective bargaining agreements brought appeals before the Commissioner without a threat to the relationship between employers and employees in the public sector.

The petitioner's statutorily created and contractually protected seniority rights were abrogated by the respondent when he was assigned to teach out-of-license while at least five [5] other Social Studies teachers junior to the petitioner were not so assigned. The use by the Court of Appeals of public policy to justify the deprivation of a property right is violative of the supreme position of the Constitution and federal law. Testa v. Katt, 330 U.S. 386, 389 (1947). The law is well settled that where the public policy of a state is used to justify and/or defend the deprivation of an individual's property rights without due process of law, that said public policy cannot prevail over the spirit or letter of the provisions of the Constitution or the federal law flowing therefrom. Testa, supra at p. 394. This view was emphatically

reinforced by this Court in Employees v. Missouri Public Health Dept., 411 U.S. 279, 298 (1973) when Mr. Justice Marshall wrote in his opinion concurring with the majority the following:

> Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy.

In effect, the public policy of New York enunciated by the Court of Appeals cannot supercede the provisions of the Constitution of the United States. (App.E at 120a).

5. The petitioner herein was assigned to teach English in violation of his statutorily created and contractually protected seniority rights. Said assignment was also made in violation of the Education Law of New York and the Rules and Regulations promulgated by the Commissioner.

The Court of Appeals has held in its

decision that Margolin cannot utilize Sec. 310 where his grievance is derived only from the provisions arising out of the collective bargaining agreement.

The Court of Appeals is in error. The Court has implied that Sec. 310 would have been available to Margolin had his complaint been on a misassignment in violation of statutory or regulatory law instead of a contractual provision protecting his seniority rights. This holding is in contradiction with the statutory law of New York.

The respondent has failed to show throughout the judicial proceedings commenced by them that they complied with Regulation 80.2(c) (App.E at 129a). in spite of allegations by the petitioner herein that they violated said regulation.

Margolin was under no duty to plead

either regulatory or statutory violations. In his Verified Answer in the proceedings before the Supreme Court of Albany County, the Commissioner alleged that the respondent had violated Sections 3001, 3009, and 3010 of the Education Law. (App. D at 101a).

The laws of New York do not require Margolin to plead said violations by the respondent herein. It is basic in the laws of New York that the courts thereof will take judicial notice of the statutes of the State and the agencies thereof. (App. E at 127a).

It is equally the basic law of New York that the action of the administrative agencies conform with the said standards developed in New York through constitutional, statutory and case law. (App. E at 126a to 127a).

It is equally the basic law of New

York that every court is required to take judicial notice of the State's statutory enactments even without any request therefore.

> The courts of New York will take judicial notice of the public statutes of the state, and in actions brought thereunder, such statutes need not be pleaded.
>
> N.Y. Statutes Sec. 351 (McKinney).

By operation thereof the claimed violations were properly raised in the proceedings for consideration by the Supreme Court of Albany County. They further establish that the Commissioner's decision was not made in violation of lawful procedure and was not affected by any error in law or fact whatsoever.

On the other hand, the annullment of the Commissioner's decision and restoration of the decision by the respondent presents a situation where the petitioner's senior-

ity rights have been deprived without due process of law. Whereas the decision of the Commissioner was in confirmation with existing law, the decision of the Court of Appeals is in conflict thereof.

CONCLUSION

It is clear that the decision made by the court below under the present facts results in a confiscation of the petitioner's property rights without due process of law and a challenge by the State of New York to the supremacy of the United States Constitution in contravention of the 14th Amendment and Article VI respectively, Said decision is in further conflict with Supreme Court decisions cited by the petitioner herein in support of his position.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

February 12th, 1988 Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK

COURT OF APPEALS

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3 No. 283
In the Matter of Board of Education, Commack Union Free School District,
Appellant,
v.
Gordon M. Ambach, Commissioner of Education of the State of New York, et al.,
Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Eugene L. Wishod & Robert H. Cohen, Melville, for appellant.

Kenneth Pawson & James H. Whitney, Albany, for resondent Commissioner.

Julius Blaushield, Hempstead, for respondent Margolin.

Norman H. Gross & Henry F. Sobota, Albany, for NYS School Boards Assn. amicus.

KAYE, J.:

A teacher alleging breach of a provision of the collective bargaining agreement between the school district and the union, having exhausted the grievance process established by the agreement and

claiming no breach of the union's duty of fair representation, cannot then petition the Commissioner of Education under Education Law § 310 for relief on that same grievance. The Commissioner's determination sustaining the teacher's appeal in these circumstances is affected by an error of law and must be annulled.

Joseph Margolin, a pre-1975 tenured secondary level social studies teacher, has been employed by the Board of Education of Commack Union Free School District (the district) for the past 19 years. Margolin is a member of the Commack Teachers Associaton (the union), the collective bargaining agent for all teachers employed by the district.

The collective bargaining agreement between the union and the district covering the 1984-85 school year provided

that district administrative personnel had the right and responsibility to make "wise and judicious use" of the teaching staff, that student welfare and efficient use of staff were among the factors to be considered in making assignments, and that "all other factors being equal, seniority shall prevail with respect to class assignments and duties..." § 18.01[k].) Because the district has a surplus of certified social studies teachers but lacked Englishand mathematics teachers, it assigned some social studies to those other subjects. Margolin was involuntarily assigned to one course outside the social studies department during the 1983-84 school year and another--Writing and Reading--for the 1984-85 year.

Margolin accepted the assignment without complaint, but when the 1984-85 school term commenced he learned that, owing to a late-August resignation, a social studies teacher who had previously taught psychology but had less seniority than he had been assigned to teach two psychology courses. Because psychology was considered a social studies class, that assignment gave theother teacher only courses within the social studies department. Margolin believed that, under the collective bargaining agreement another teacher with less seniority should have been assigned to teach Writing and Reading and that he should have been assigned only courses within his department. Arguing that the district has breached the agreement by making these assignments, Margolin then

began a grievance proceeding under the collective bargaining agreement.

The collective bargaining agreement established a four-stge grievance procedure, the first three stages of which could be pursued by the union or any employee individually. The fourth stage, binding arbitration before the Public Employment Relations Board (PERB) could be initiated by the district or by the union, but not by the aggrieved employee. Margolin first presented his grievance to his union representative who, after investigation, informed him that theunion had concluded that his grievance lacked merit. The letter noted that the union would nonetheless help Margolin protect his rights under Article XXXII ("Grievance and Arbitration Procedures") and directed his attention

particularly to the provision entitling a grievant to be represented by the person of his choice at all available stages of the grievance procedure. Margolin appealed this determination tothe union's executive board. The union president advised him that further investigation reinforced the conclusion that the grievance was without merit. The president noted that "all other factors" were not equal so that, under § 18.01 (k) of the agreement, seniority alone wasnot dispositive.

Margolin also pursued this grievance independently. His immediate supervisor denied the grievance, noting that the assignment was part of an effort to make "wise and judicious" use of the entire department staff and to "rotate assignments on an equitable and fair

basis." Margolin next presented the grievance to his principal, who also denied it. The principal stated that assignments had been based on criteria required by the contract--student welfare and efficient staff utilization--so that "all other factors" were not equal and seniority alone should not have been determinative of the assignment. Margolin next invoked the third, "formal" stage of the contract's grievance procedure by requesting a hearing before the Superintendent of Schools or his designee. In that letter Margolin alleged that at least five teachers with less seniority were teaching entirely within the social studies area. The hearing officer, after a hearing, issued a decision denying the grievance, concluding (after a full recital) that

the relevant factors other than seniority supported Margolin's assignment to the Writing and Reading class and there was no violation of the agreement as alleged. The assignment also was found to be consistent with a longstanding practice of assigning non-social studies classes to the entire social studies department on a rotating basis without regard to seniority.

Having failed to obtain relief within the grievance process provided by the collective bargaining agreement, Margolin filed a Petition of Appeal with the Commissioner of Education complaining of the very same grievance-- that his assignment violated § 18.01 (k) of the

collective bargaining agreement.[1] The appeal was lodged pursuant to Education Law § 310, which provides:

> Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and requied to examine and decide the same ***. The petition may be made in consequence of any action:
>
> * * *
>
> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

Among the defenses pleaded by the district were that the petition was legally insufficient in that it did not allege that the union had breached its duty of fair representation and that the

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[1] While Margolins brief in this Court now characterizes his complaint as one for out-of-certification assignment (see, Education Lw §§ 3001, 3009(1), 3010; 8 NYCRR 80.2[c]), the Petition itself describes only the alleged violation of § 18.01(k) of the agreement.

union, a necessary party, had not been joined.

The Commissioner sustained Margolin's appeal, reasoning that absence of the union was irrelevant because it is not within his jurisdiction and he thus could not be concerned with the adequacy of the union's representation. Because Margolin had exhausted his remedies under the contract, albeit without reaching binding arbitration, the Commissioner concluded that administrative review was available. On the merits he determined that the district had failed to state what "other factors" were controlling in the assignment of junior teachers to social studies assignments, and found that the district had failed to consider Margolin's seniority adequately. The Commissioner directed that future

assignments be made in accordance with the contract, taking into consideration the improper assignment for the 1984-85 school year.

The district then brought this article 78 proceeding to annul the Commissioner's determination. Special Term dismissed the petition, finding that the Commissioner's decision was not arbitrary, capricious or in violation of law, and the Appellate Division affirmed, two justices dissenting. We now reverse and annul the Commissioner's determination.

The district acknowledges that, had Margolin in the first instance made a timely appeal to the Commissioner challenging his assignment on the ground that it contravened the Education Law and the Commissioner's regulations governing

incidental teaching assignments, without question the Commissioner could have determined that appeal on its merits. That issue is not before us. The question beforeus is whether the same result should obtain when the petition is based on a provision of a collective bargaining agreement relating to seniority, rather than one cast as a matter of education law or policy, and when the employee has first prosecuted that same issue through the grievance process provided by the collective bargaining agreement. We answer that question in the negative.

As a general proposition, when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of

that agreement but must proceed, through the union, in accordance with the contract. Unless the contract provides otherwise, only when the union fails in its duty of fair representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer (see, Berlyn v Board of Educ., 55 NY2d 912, affg on mem at 80 AD2d 572; Chupka v Lorenz-Schneider Co., 12 NY2d 1, app dismissed 372 US 227; Menkes v City of New York, 91 AD2d 654, lv dismissed 59 NY2d 762, cert denied 464 US 858; see also, Baker v Board of Educ., ___NY2d___ [decided October 13, 1987]). These principles, borrowed by state law from private sector law under the Labor-Management Relations Act (29 USC § 151 et seq.), are also apt where the issue is not resort to the courts but an effort to

pursue a contractual grievance in a statutory appeal under Education Law §310, particularly where the employee has actually pursued his contract grievance through the stipulated procedures.

While the Commissioner viewed Margolin's tireless pursuit of his contract remedies as entitling him to an appeal under Education Law §310, these facts propel us to the opposite conclusion. Exhaustion of contract remedies in this situation is not a gateway to review by the Commission of the very same grievance under a collective bargaining agreement but an election of consequence. As cogently expressed in the Appellate Division dissent of Justice Levine, permitting an employee to invoke Educaton Law § 310 "to upset the final resolution of a grieved

dispute, inviting the Commissioner to act, in effect, as a super arbitrator, would destroy the finality of grievance/arbitration determinations in the public employment sector necessary to effectuate ... state policy." (121 AD2d 135, 142).

Several policy grounds underlie restricting Margolin to his chosen contractual remedies here and denying appeal of this particular grievance to the Commissioner. Grievance procedures have been recognized as serving the interests of all parties involved in collective bargaining. They enable the union to participate in administering the contract it negotiated; they aid the employer by channeling grievances into one forum providing one set of remedies; and they permit efficient protection of

employee rights (Republic Steel Corp. v Maddox, 379 US 650, 653). They are Congress' preferred method for settling disputes and stabilizing the 'common law' of the plant." (Id.) Allowing individual employees to circumvent the grievance procedure in favor of other remedies as a general matter would impair those interests, deprive the parties of the opportunity to "establish a uniform and exclusive method for orderly settlement of employee grievances," and "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." (Id., quoting Teamsters Local v Lucas Flour Co., 369 US 95, 103.) Moreover, disrupting the contract's settlement procedures in this fashion has been viewed as threatening the union's authority as representative

and weakening the individual emplyee's protection (Vaca v Sipes, 386 US 171, 191; see also, Parker v Borock, 5 NY2d 156, 162, [Fuld, J., concurring]; Cox, Rights Under a Collective Bargaining Agreement, 69 Harv L Rev 601, 625-627.) Only when a union has failed to represent an employee fairly--effectively depriving the employee of full use of the agreed procedures--does concern for employees' rights require that they be allowed to pursue grievances beyond the contractual mechanism (Berlyn v Board of Educ, 55 NY2d 912, supra; Vaca v Sipes, 386 US 171, supra).

The New York State Legislature has recognized the strong policy favoring internal grievance mechanisms and the finality of the grievance process in public collective bargaining agreements.

It is the policy of this State "to promote harmonious and cooperative relationships between government and its emplyees and to protect the public by assuring, at all times, the olderly and uninterrupted operations and functions of government." (Civil Service Law § 200.) This policy is "best effectuated" by "encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes." (Civil Service Law § 200[c].) The Taylor Law further grants to public employees the right to be represented by unions to negotiate the terms and conditions of their employment "and the administration of grievances arising thereunder." (Civil Service Law § 203.) The employer's duty to negotiate collectively includes a duty to negotiate "an agreement, or any

question arising thereunder." (Civil Service Law § 204[3].) Permitting employees to prosecute alleged violations of the agreement beyond the contractual grievance procedure obviously unsettles the finality of grievance determinations that is central to implementation of State policy, and the right to bring such proceedings is therefore restricted.

We turn next to the relation of these principles to the broad powers granted to the Commissioner under the Education Law.

The Commissioner of Education and the Board of Regents are vested with power to manage educational affairs and establish and enforce education policy (NY Const art V, ¶ 4, art XI § 2; Education Lw §§ 207, 305). The Commissioner is charged with the general

supervision of boards of education ofunion free school districts and their management and conduct of all departments of instruction (Education Law § 309); "any person conceiving himself aggrieved may appeal or petition" to him (Education Law § 310). This broad review power exists so as "to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same as far as practicable and possible from controversies in the courts." (Donohue v Copiague Union Free School Dist., 47 NY2d 440, quoting Bullock v Cooley, 225 NY 566, 576-577; Matter of Vetere v Allen, 15 NY2d 259, 266, cert denied 382 US 825).

Education Law § 310 itself specifies a number of areas in which the Commissioner may hear appeals, including structure of school districts and payment of money to them, payment to teachers, admission of students, use of school libraries and other matters arising from official acts of school authorities. We have recognized the broad authority of the Commissioner in such matters as the issue of "educational malpractice" (Donohue v Copiague Union Free School Dist., 47 NY2d 440, supra), the establishment of standards for granting high school diplomas (Matter of Board of Educ. v Ambach, 60 NY2d 758, affg 90 AD2d 227, cert denied 465 US 1101), the determination of appropriate hours of instruction (Matter of NYC School Bds. v Board of Educ., 39 NY2d 111), racial

balance in schools (Matter of Vetere v Allen, 15 NY2d 259, supra), and dissolution and consolidation of school districts (Bullock v. Cooley, 225 NY 566). The district suggests, as a further example, a teacher's challenge under the Education Law on the ground that assignments fall outside certification and competency.

The Commissioner's broad review powers are not, however, unlimited. It is plain from the Petition of Appeal that what Margolin placed before the Commissioner was cast as the identical contract issue he had previously elected to submit under the grievance procedure provided by the collective bargaining ageement. In these circumstances, recognizing the right of review by the Commissioner would serve neither the

Education Law objective of providing a quick, simple method of resolving policy questions that recur in school administration nor the Civil Service Law objective underlying collective bargaining in public sector employment.

Both the Commissioner and the Appellate Division majority found material found material the fact that only the district and the union--not Margolin himself--could take the grievance to binding arbitration. We disagree. When Margolin elected to follow the contract grievance procedure, he did so knowing that his union would control the decision whether to reach arbitration. He left that authority with them. Without a showing that the union breached its duty of fair representation in prosecuting the employee's grievance,

its decision to conclude the greivance process short of the final step allowed by contract or law is binding on the employee and precludes resort to additional remedies (see, Matter of Civil Serv. Bar Assn. v City of New York, 64 NY2d 188; Abrams v Board of Education, 91 AD2d 618).

Our conclusion is consistent with Board of Educ.v Associated Teachers of Huntington (30NY2d 122), where we recognized that, although the Legislature had given a tenured teacher a choice of two methods of statutory appeal to challenge an adverse decision of the school board, the board could agree that the teacher might choose arbitration as a third method of reviewing its determination (30 NY2d at 131). As we held there, however, a final decision

byany one spells the end of the matter (30 NY2d at 132; see also, Dye v New York City Transit Auth., 88 AD2d 899, affd 57 NY2d 917, Matter of Kavoukian v Bethlehem Central School Dist., 63 AD2d 767). By the same token, Margolin's grievance terminated when he exhausted internal procedures and, in seeking further appeal of the very same contract matter, made no showing of breach of the union's duty of fair representation that might permit him to go beyond the stipulated grievance mechanism.[2]

Accordingly, the Appellate Division order should be reversed, with costs, and

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[2] Margolin's contention that the article 78 petition is premature, because the district failed to seek reopening of the Commissioner's decision (8 NYCRR 276.7), is without merit. The Commissioner's decision was final and binding (contrast Martin v Ambach, 57 NY2d 1001), and thus subject to challenge by an article 78 proceeding (see, Matter of deMilio v Borghard, 55 NY2d 216).

the determination of the Commissioner of Education annulled.

* *

Order reversed, with costs, and determination of the Commissioner of Education annulled. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

Decided November 19, 1987

APPENDIX B

December 24, 1986 52040

In the Matter of BOARD OF EDUCTION, COMMACK FREE SCHOOL DISTRICT, Appellant,	]	
v	]	OPINION
GORDON H. AMBACH, as Commissioner of Education of the State of New York, et al., Respondents.	]	

Argued, September 11, 1986

Before:
HON. ROBERT C. MAIN,
Justice Presiding,
HON. ANN T. MIKOLL
HON. PAUL J. YESAWICH, JR.
HON. HOWARD A. LEVINE,
HON. NORMAN L. HARVEY,
Associate Justices.

APPEAL from a judgment of the Supreme Court at Special Term (VINCENT G. BRADLEY, J.), entered November 27, 1985 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review the determination of respondent Commissioner of Education finding that petitioner improperly assigned one of its teachers.

CAHN WISHOD WISHOD & LAMB (Eugene L.

Wishod of counsel), 534 Broadhollow Road - CB179, Melville, New York 11747, for appellant.

ROBERT D. STONE (Kenneth Pawson of counsel), Education Department, State Education Building, Albany, New York 12234, for Gordon H. Ambach, respondent.

JULIUS BLAUSHIELD, 71 North Franklin Street, Hempstead, New York 11550, for Joseph B. Margolin, responsent.

MIKOLL, J.

The issue before us is whether an individual employee, asserting a right under a collective bargaining agreement in force at the time of his involuntary teaching assignment, is barred from asserting that right in a separate appeal to the Commission of Education pursuant to Education Law § 310 (7).

Respondent Joseph B. Margolin is a tenured teacher in the Commack Union Free School District in Suffolk County. He serves in a general secondary tenure area and is certified as a high school social

studies teacher with 16 years of experience. Because of the excess of social studies teachers with seniority-protected job rights and a lack of English and mathematics teachers, involuntary assignments were made of social studies teachers, including Margolin, to other than social studies classes.

In the 1984-1985 school year Margolin was assigned outside his certified area to teach a class entitled "Writing and Reading". He accepted the assignment without objection until he learned in September that another teacher with less seniority was assigned to teach entirely within the social studies curriculum. Margolin lodged a complaint with his union, the Commack Teachers' Association (CTA), which was the exclusive negotiating representative for the district's high school teachers. The collective bargaining agreement between

petitioner and CTA required that a teacher's seniority be recognized in making assignments. It also provided for a four-step grievance procedure, the fourth step of which consisted of binding arbitration, a stage that only CTA could initiate.

CTA found Margolin's grievance meritless and refused to pursue it for him. Margolin pursued his grievance independently up the three steps available to him. At the first two levels of the grievance procedure, the grievance was denied on the ground that the reason for assigning a less senior teacher to a totally social studies assignment was justified by other factors including efficient use of staff resources and rotation of assignments on an "equitable and fair basis"; thus, it was concluded, seniority rights had been properly subordinated. At the third stage, the hearing office held that the failure to change

Margolin's assignment in late August, when additional assignments to social studies classes became available, was proper. The hearing officer found that the principal adequately considered available course preparation time, prior preparation and prior teaching experience, and that these factors plus factors set out in the collective bargaining agreement* entitled

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* The collective bargaining agreement provided in part:

> 18.01 The right and responsibility of administrative personnel to make wise and judicious use of the professional staff is recognized of this right, administrative personnel are to use as the prime criterion the welfare of the children placed in the teacher's charge take together with efficient staff utilization in professional activities. To this end, the parties agree to the following:
>
> a. The teaching assignment of a teacher shall be entirely within the area of his competency and/or certificate

her to subordinate seniority rights.

Having exhausted the procedures available to him under the collective bargaining

(footnote continued)

> and in no event shall a teacher teach more than one period per day outside his area of certification.
>
> b. In making teaching assignment, the building (or District) administrators shall make provisions for professional growth by encouraging a pattern of rotation of teacher assignments in such a way that no one area of activity becomes the exclusive province of any one individual or class of teachers.
>
> * * *
>
> k. All other factors being equal, seniority shall prevail with respect to class assignments and duties, class loads and use of portable classrooms. Such seniority rights shall be accorded to tenured teachers only and shall be based only on the total number of years teaching in the District.

agreement and CTA having declined to pursue binding arbitration, Margolin commenced a proceeding by petition to respondent, Commissioner of Education pursuant to Education Law § 310 (7). Petitioner, in its answer to Margolin's appeal, contended that it should not be entertained because (1) Margolin had failed to show that CTA had breached its duty of fair representation to him, (2) he failed to join CTA as a necessary party, and (3) petitioner's construction of the collective bargaining agreement was neither irrational, arbitrary or capricious.

The Commissioner determined that CTA was not a necessary party to the appeal and granted Margolin's petition holding that petitioner had failed to present in specific enough detail the factors upon which it based its determination and that petitioner failed to properly consider

seniority. Accordingly, petitioner's decision was reversed as arbitrary and capricious.

Special Term affirmed the Commissioner's determination finding that it was not arbitrary or capricious or in violation of law, and dismissed petitioner's CPLR article 78 application.

Petitioner argued on this appeal that Margolin, an individual employee asserting a right under a collective bargaining agreement in force at the time, is barred from asserting that right in an appeal to the Commissioner absent a clear showing of a breach by CTA of its duty of fair representation, that CTA is a necessary and indispensable party to the appeal and failure to join it is fatal to the proceeding, and, finally, that the Commissioner's determination is irrational, arbitrary and capricious.

Addressing petitioner's contentions ad seriatum, we hold that Margolin's appeal to the Commissioner is an independent remedy available to him pursuant to Education Law § 310. He was thus not required to make a preliminary showing that CTA breached its duty of fair representation to him to pursue it. Margolin's petition before the Commissioner alleged that he had been aggrieved by petitioner's official acts. The Commissioner has been granted board powers as chief administrative officer of the State Education Department (see, NY Const, art V, § 4; art XI, § 2; Education Law §§ 207, 307; see also, Matter of New York City School Bds. Assn. v. Board of Educ. of City School Dist. of City of N.Y., 39 NY2d 111, 116; Matter of Board of Educ. of Northport-East Northport Union Free School Dist. v Ambach, 90 AD2d 227, 231, affd

60 NYS2d 758). Inherent in those powers is the right to examine and decide appeals to him from aggrieved persons who seek relief relevant to an education matter where their rights are implicated by official acts of school authorities. Such an interpretation is consistent with the Commissioner's broad mandate to control and manage the State's educational affairs and with the purpose of Education Law § 310. We hold that the instant collective bargaining agreement did not foreclose Margolin from appealing to the Commissioner. We find petitioner's cited authorities inapplicable to the instant situation as we read them more narrowly than proposed by petitioner. A collective bargaining agreement may foreclose a union member's individual right to sue his employer for damages in a judicial tribunal (see, Goosley v Binghampton City School Dist.

Bd. of Educ., 101 AD2d 942, 943). In other instances, where a negotiated union contract offers an alternative method of resolving disputes via binding arbitration and a member elects to so proceed, he waives rights accorded to him by statutory law (see, Dye v New York City Tr. Auth., 88 AD2d 899, affd 57 NY2d 917). Here, Margolin did not proceed to binding arbitration. The right to do so was not available to him. Neither did he elect to waive his statutory rights under Education Law § 310 (7) by pursuit of some other remedy.

We concluded, as well, that it was not necessary to join CTA as a party in the administrative proceeding. The Commissioner has no power over CTA and, further, his decision does not relate to any rights of the union.

Finally, addressing the validity of

the Commissioner's decision, we note that our review thereof is limited. If the decision has a rational basis, it cannot be overturned (Matter of Shurgin v Ambach, 56 NY2d 700). We note that petitioner attempted to amplify its position at Special Term by the submission of an affidavit of the assistant superintendent, with two attached exhibits, and an affidavit of the school attorney. These had not been before the Commissioner and cannot now be considered as part of the record on appeal (see Yanoff v Commissioner of Educ. of State of N.Y., 64 AD2d 763). The Commissioner's finding that the submissions of petitioner were insufficient to establish any basis for assigning Margolin to teach an English course as opposed to the five teachers junion to him in seniority so as to justify a disregard of his seniority

rights is supported by the record.

LEVINE, J. (dissenting).

I respectfully dissent. The issue on respondent Joseph B. Margolin's appeal to respondent Commissioner of Education was purely one concerning construction of a common, management prerogative clause of the collective bargaining agreement, which Margolin's bargaining representative, the Commack Teachers' Association (CTA) negotiated and entered into. Margolin's appeal to the Commissioner occurred only after he had voluntarily elected to invoke the grievance machinery of the agreement, exhausted all of his remedies thereunder and received an unfavorable result. No overriding issue of educational police was involved in that appeal, either under the teacher assignment clause itself or in the resolution of the dispute at the conclusion of the grievance process.

There has been no determination by the Commissioner that CTA violated its duty of fair representation to Margolin and, in fact, his complaint to the State Public Employment Relations Board on that ground was subsequently dismissed, as unsupported, after a full hearing. Under the foregoing circumstances, I am of the view that the Commissioner should not have undertaken to overturn the result of the agreement's grievance procedures and to substitute his own interpretation of the contract provision under review. Accordingly, his determination was affected by an error of law (CPLR 7803 [3]) and should be annulled.

The grievance procedure contained in the contract between the petitioner and CTA implements a strong State policy in favor of "encouraging * * * public employers and * * * employee organizations

to agree upon procedures for resolving disputes" (Civil Service Law § 200 [c]) and giving employee organizations such as Margolin's union control in dealing with the employer over the "determination of * * * terms and conditions of employment, and the administration of grievances arising thereunder" (Civil Service Law § 203) (emphasis supplied). To permit a disgruntled employee to invoke the appellate authority of the Commissioner under Education Law § 310 in order to upset the final resolution of a grieved dispute, inviting the Commissioner to act, in effect, as a super arbitrator, would destroy the finality of grievance/arbitration determinations in the public employment sector necessary to effectuate the foregoing State policy. This remains true whether the dissatisfied employee's attack on the

unfavorable outcome of the grievance process is made via an appeal to the courts or to the responsible administrative agency. "A contrary rule * * * would deprive employer and union of the ability to establish a uniform and exclusive method of orderly settlement of employee grievances. * * * A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining'" (Republic Steel Corp. v Maddox, 379 US 650, 653, quoting Local 174, Teamsters v Lucas-Flour Co., 369 US 95, 103).

Nor, despite the majority's contrary conclusion, does the broad statutory appellate power of the Commissioner over education matters override the foregoing State policy favoring the finality of the result of the grievance process in public

collective bargaining agreements, at least where, as here, no serious issue of State educational policy is involved. Indeed, in Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington (30 NY2d 122) the Court of Appeals considered this very issue with respect to appeals to the Commissioner under Education Law § 3020-a (5) following grievance arbitration, and resolved the issue in favor of finality:

> We would but add that there is no basis for the fear expressed that to permit the grievance to go to arbitration will enable the employee to appeal - pursuant to section 3020-a, subdivision 5, of the Education Law - to the arbitrator after he has lost before the Commissioner or the court or, conversely, to the Commissioner of Education or the Supreme Court after he has submitted to arbitration and lost before the arbitrator. Once the controversy is heard and the decision arrived at either

> by the arbitrator or by the Commissioner or by the judge, that is the end of the matter (id., at 132) (emphasis in original).

Following the decision in Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington (supra), other cases have similarly held that a public employee who opted for and then unsuccessfully pursued the grievance procedure of the controlling collective bargaining agreement is precluded thereafter from seeking to overturn an unfavorable result through a statutory administrative appeal (see, Dye v New York City Tr. Auth., 88 AD2d 899, affd 57 NY2d 917; Matter of Kavoukian v. Bethlehem Cent. School Dist., 63 AD2d 767, 768, lv denied 46 NY2d 709).

Finally, I find of no significance that, in the instant case, Margolin exhausted his contract grievance remedies

without reaching the fourth and final stage thereof in a formal arbitration which, under the agreement, only CTA could demand. Once Margolin proceeded through the grievance process to determine his complaint, he ceded his autonomy to control the prosecution of that claim at the final stage to CTA as provided in the agreement. In the absence of a demonstrated breach of the duty of fair representation, a union's disposition of the grievance process, by settlement with the employer pending arbitration (Abrams v Board of Educ. of City of Yonkers, 91 AD2d 618, 619-620) or while judicial review of an aware was pending (Matter of Civil Serv. Bar Assn., Local 237, Int. Brotherhood of Teamsters v City of New York, 64 NY2d 188), has been held binding on an affected employee (see also, Alfieri v General Motors Corp., 367 F Supp 1393, affd 489 F2d 731). Unless

unfair representation is shown, a union's decision to conclude the grievance process as authorized under the collective bargaining agreement precluded resort to any alternative remedies by the employee. As stated in Alfieri v General Motors Corp. (supra, p 1395): "If [the employee] has exhausted his collective bargaining remedies in his claim for back pay, he is bound by the decision reached through the collective bargaining procedures * * *. He has failed to show any improper or had faith conduct on the part of the Union in processing his grievance which would repudiate the collective bargaining decision" (citation omitted).

Here, also, unless CTA unfairly represented Margolin in the grievance procedures, set up in the collective bargaining agreement, his election to take the grievance route to resolve his claim

constitutes a waiver of any alternative remedies, including an appeal to the Commissioner. Accordingly, I would reverse the dismissal of the petition and annul the Commissioner's determination.

Opinion by MIKOLL, J., in which MAIN, J.P., and YESAWICH, JR., J., concur; LEVINE and HARVEY, JJ., dissent and vote to reverse in an opinion by LEVINE, J.

Judgment affirmed, without costs.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 2nd day of September, 1986.

PRESENT:
HON. ROBERT G. MAIN,
Justice Presiding,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. HOWARD A. LEVINE,
HON. NORMAN L. HARVEY,
Associate Justices.

In the Matter of the Application of BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT,

Petitioner-Appellant,

-against-

GORDON M. AMBACH, Commissioner of Education of the State of New York, and JOSEPH B. MARGOLIN,

Respondents-Respondents.

ALBANY COUNTY CLERK'S INDEX NO. 8530-85

The Board of Education of the Commack

Union Free School District having appealed from a judgment of the Supreme Court of Albany County, entered on the 27th day of November, 1985, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Cahn, Wishod, Wishod & Lamb (Eugene L. Wishod, Esq.), of counsel for appellant, and by Robert D. Stone (Kenneth Pawson, Esq.), of counsel for respondent Ambach, and by Julius Blaushield, Jr., of counsel for respondent Margolin, and, after due deliberation, the Court having rendered a decision on the 24th day of December, 1986 Justices Levine and Harvey dissenting, it is hereby

ORDERED that the judgment so appealed from be and hereby is affirmed, without

costs.

ENTER:

/s/ Michael J. Novack
Clerk

DATED AND ENTERED: January 5, 1987.

A TRUE COPY

Michael J. Novack
CLERK

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse in the City of Albany, on the 22nd day of November, 1985.

PRESENT:

HON. VINCENT G. BRADLEY,
Justice of the Supreme Court

In the Matter of the Application of

BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT,

Petitioner,

-against-

GORDON M. AMBACH, Commissioner of Education of the State of New York, and JOSEPH MARGOLIN,

Respondents.

JUDGMENT

Index No. 8530-85

Petitioner, the Board of Education of the Commack Union Free School District, having commenced a proceeding pursuant to

Article 78 of the Civil Practice Law by Gordon M. Ambach, as Commissioner of Education of the State of New York, which found that the board of education improperly assigned respondent Joseph B. Margolin and directed that future assignments take into consideration said improper assignment; and respondents having both answered the petition and asked that it be dismissed, and said proceeding having come on to be heard on the 22nd day of November, 1985, and the petitioner Board of Education of the Commack Union Free School District having duly appeared by Cahn, Wishod, Wishod & Lamb (Robert H. Cahn, of counsel) and respondent Gordon M. Ambach, as Commissioner of Education of the State of New York, having appeared by Robert D. Stone (Kenneth Pawson, of counsel) and the respondent Joseph B. Margolin having appeared by Julius Blaushield, and the

matter having been argued by the parties upon the call of the calendar;

NOW, upon reading and filing the notice of petition and petition duly verified on the 12th day of August, 1985, and the annexed exhibits, and the answer and exhibits submitted on behalf of respondent Gordon M. Ambach, verified October 30, 1985 and the answer of the respondent Joseph B. Margolin, verified on September 26, 1985, and its supporting affidavit and attached exhibits, and due deliberation having been had, and the Court having rendered a decision on November 22, 1985, at the time of argument, that the action of the Commissioner of Education as reflected in Decision No. 11450 was neither arbitrary nor capricious, nor in violation of law, upon motion of Robert D. Stone, Kenneth Pawson, of

counsel, it is

ORDERED that petitioner's application be, and the same hereby is, dismissed without costs.

ENTER:

/s/Vincent G. Bradley
Justice of the Supreme Court

Dated: Kingston, New York
November 27, 1985

No. 11450

The University of the State of New York

The State Education Department

Before the Commissioner

IN THE MATTER

of the

Appeal of JOSEPH B. MARGOLIN from action of the Board of Education of the Commack Union Free School District relating to teaching assignment.

Julius Blaushield, Esq. .....attorney for petitioner

Cahn, Wishod, Wishod & Lamb, Esqs. .....attorneys for respondent
Robert H. Cohen, Esq., of counsel

Petitioner appeals from action of the respondent in assigning him to teach an English class for the 1984-85 school year. The appeal must be sustained.

Petitioner has been continuously employed as a teacher in the Commack Union

Free School District since September 1968, when he was hired as a high school social studies teacher. Petitioner serves in the general secondary tenure area, and is certified as a social studies teacher. For the current school year, petitioner was assigned to teach a "Writing and Reading" course as one of his daily teaching classes. He subsequently learned that at least one other teacher, with less seniority than he, is not assigned to teach a class outside the social studies department.

In reliance upon the current collective bargaining agreement between respondent and the Commack Teachers Association, which required that a teacher's seniority be recognized in making assignments, petitioner has argued that his current assignment is incorrect. Neither party has specifically referred to section 80.2(c)

of the Regulations of the Commissioner of Education, which provides for incidental teaching assignments outside a teacher's certification area, and hence it is assumed that there has been compliance with the requirements of that section.

Petitioner attempted to alter his assignment by filing a grievance, but has been unsuccessful at each level of the grievance procedure. At the first stage, his union representative conferred with petitioner's immediate supervisor, and then met with the principal. The grievance was denied. Petitioner then pursued his grievance through the next stage, described as the "informal," "intermediate" and "formal" stages, but without assistance from his union. That procedure culminated in the appointment of a hearing officer and a decision by respondent's superintendent of schools dated December 3, 1984.

Since only petitioner's union may choose to advance the next stage, arbitration, and declined to do so, petitioner has been unable to pursue his complaint by means of the grievance procedure.

Both petitioner and respondent have submitted argument with respect to whether or not petitioner's seniority was respected, and have cited the provision of the collective bargaining agreement that: "All other factors being equal, seniority shall prevail with respect to class assignment and duties ..." It is petitioner's contention that his assignment outside his social studies area was improper because there are at least five other social studies teachers with less seniority than petitioner, none of whom were given involuntary assignments.

Respondent's defense does not rely upon petitioner's delay from June to

September in protesting his assignment. Instead, it is limited to three points: that the teachers union is a necessary party but was not joined as a respondent; that the union did not wrongfully choose not to pursue petitioner's grievance beyond the superintendent's level to the arbitration stage; and that respondent's construction of the collective bargaining agreement was "rational and not arbitrary or capricious".

I do not agree that petitioner was required to join as a respondent to his appeal the Commack Teachers Association as petitioner's collective bargaining agent. I lack jurisdiction over that organization, and no purpose would be served by purporting to name it as a respondent in an appeal brought pursuant to Education Law section 310 (Matter of Seidenberg, 15 Ed. Dept. Rep. 291).

Therefore, the union's alleged failure to properly represent petitioner is not an issue with which I may concern myself.

Petitioner may, however, maintain an appeal to the Commissioner of Education pursuant to Education Law section 310 to enforce rights he may have under the collective bargaining agreement (Matter of Martz, 18 Ed. Dept. Rep. 508). In this instance, petitioner has exhausted the administrative remedy available to him by filing a grievance pursuant to the current collective bargaining agreement, and has been unable to advance to the next step, arbitration, because his union declined his request to do so. It is undeniable that petitioner has pursued his available remedy to the extent possible and may now seek relief in this forum.

The issue then is whether petitioner's

seniority has been respected, in accordance with the relevant provision of the contract. Respondent has submitted an affidavit from the assistant superintendent who served as hearing officer in petitioner's grievance. In his affidavit, and also in his decision as hearing officer, the assistant superintendent fails to identify any "other factor" present in petitioner's situation which distinguishes his assignment from that of the five other teachers junior to petitioner. The assistant superintendent indicates, however, that petitioner was assigned to a writing-reading class "upon the recommendation of Dr. Joseph Walter, petitioner's department chairperson"; that the assignment was "confirmed and implemented by the building principal"; that both made their determinations based upon "their belief

that the petitioner's teaching strengths, particularly the high degree of organization and structure he provides within his lessons, were very well suited to the curriculum of the writing-reading course"; and, that other factors considered were teacher certification, class load, relative strengths and weaknesses of various teachers within subject areas and the number of consecutive teaching periods. No specifics whatever were offered concerning those factors enumerated by the assistant superintendent, and there is no indication that any of those factors, particularly certification status, are different with respect to the other teachers concerned.

The standard of review in appeals to the Commissioner of Education involving the interpretation of a collective bargaining agreement is whether the

interpretation by the board of education is unreasonable, arbitrary or capricious (Matter of Blumenfeld, 21 Ed. Dept. Rep. 236). Respondent seems to have selected petitioner principally because petitioner's supervisors recommended him for the objectionable assignment. Yet, it cannot be that the collective bargaining provision means no more than that the department head and principal may assign staff as they see fit, since that is the situation which would pertain without the contract provision. In view of the lack of specifics offered by respondent, I can only conclude that respondent failed to properly consider petitioner's seniority in making assignments for the current school year. However, since any reassignment at this time would be disruptive to the students, and since such disruption would constitute a factor which, under

the contract, justifies disregarding petitioner's seniority in making an assignment, it will be sufficient for respondent to make future assignments in accordance with the contract language, as interpreted in this decision.

THE APPEAL IS SUSTAINED, and

IT IS ORDERED THAT respondent assign petitioner in the future in accordance with his seniority, taking into consideration that for the 1984-85 school year it improperly assigned him to teach an English class.

IN WITNESS WHEREOF, I, Gordon M. Ambach, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 30th day of April, 1985.

/s/ Gordon M. Ambach
Commissioner of Education

APPENDIX C

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge,
Presiding

3 No. 283
In the Matter of Board of Education, Commack Union Free School District,
Appellant,
v.
Gordon M. Ambach, Commissioner of Education of the State of New York, et al.,
Respondents.

The appellant in the above entitled appeal appeared by Cahn, Wishod, Wishod and Lamb, Esqs.;

the respondent(s) appeared by James H. Whitney, Esq., Counsel, State Education Department; and Julius Blaushield, Esq.; and the amicus curiae appeared by Norman H. Gross, Esq., Counsel, N.Y.S. School Boards Association.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and determination

of the Commissioner of Education annulled. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings of this Court be remitted to the Supreme Court, Albany County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/Donald M. Sheraw
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 19, 1987.

APPENDIX D

ARTICLE XVIII

TEACHER ASSIGNMENT AND TRANSFER

18.01 The right and responsibility of administrative personnel to make wise and judicious use of the professional staff is recognized and affirmed. In the exercise of this right, administrative personnel are to use as the prime criterion the welfare of the children placed in the teacher's charge taken together with efficient staff utilization in professional activity. To this end, the parties agree to the following:

[k.] All other factors being equal, seniority shall prevail with respect to class assignments and duties, class loads and use of portable classrooms. Such seniority shall be accorded to tenured teachers only and shall be based only on the total number of years teaching in the District.

ARTICLE XXXII

GRIEVANCE AND ARBITRATION PROCEDURES

32.00 The Board in compliance with Article 16 of the General Municipal Law (Chapter 554 of the Laws of 1962) regarding the establishment of grievance procedures for public employees, does hereby establish and adopt the following procedures for the orderly settlement of grievances of employees of the District to be effective July 1, 1970.

32.01 In order to establish a more harmonious and cooperative relationship between the Board and its employees, which will enhance the educational program of the District, it is hereby declared to be the purpose of these procedures to provide a means for orderly settlement of differences, promptly and fairly, as they arise and to assure equitable and proper treatment of employees pursuant to

established rules, regulations and policies of the District. The provisions of these procedures shall be liberally construed for the accomplishment of this purpose.

[32.16] Grievance Procedures

a. Informal Stage - the aggrieved employee or CTA shall orally present his grievance to his immediate supervisor who shall orally and informally discuss the grievance with the aggrieved employee or CTA. The immediate supervisor shall render his determination to the aggrieved employee or CTA within five school days after the grievance has been presented to him. If such grievance is not satisfactorily resolved at this stage, the aggrieved employee or CTA may proceed to the intermediate stage or formal stage as the case may be.

b. Intermediate Stage - within

five school days after a determination has been made at the preceding stage, the aggrieved employee or CTA may in writing present his grievance to the intermediate supervisor to whom his immediate supervisor is immediately responsible, if such there be, who shall orally discuss the grievance with the aggrieved employee or CTA. The intermediate supervisor shall render his determination to the aggrieved employee or CTA within five school days after the grievance has been presented to him. If such grievance is not satisfactorily resolved at this stage, the aggrieved employee or CTA may proceed to the formal stage.

c.1. Formal Stage - within five school days after a determination has been made by the immediate supervisor or intermediate supervisor, as the case may be, the aggrieved employee or CTA may

make a written request to the Chief Administrator or his designee for review and determination. If the Chief Administrator designates a person to act in his behalf, he shall also designate full authority to render a determination in his behalf.

2. The Chief Administrator or his designee shall immediately notify the aggrieved employee or CTA, immediate supervisor and any other administrator previously rendering a determination in the case to submit written statements to him within five school days setting forth the specific nature of the grievance, the fact relating thereto, and the determination previously rendered.

3. If such is requested in the written statement of either party pursuant to paragraph 2, above, the Chief

Administrator or his designee shall notify all parties concerned in the case, of the time and place when an informal hearing will be held where such parties may appear and present oral and written statements supplementing their position in the case. Such hearings shall be held within five school days of receipt of the written statements pursuant to paragraph 2.

4. The Chief Administrator or his designee shall render his determination within ten school days after the written statements pursuant to paragraph 2 have been presented to him.

32.17 Binding Arbitration Procedure

a. If the grievance has not been satisfactorily resolved in the above stages, either party to this agreement (the Board or the CTA and no other person) may, within five school days of the determination required by 32.16 c.4

above, make a written demand for arbitration to the Public Employment Relations Board in accordance with its Rules and Procedures then prevailing. The arbitrator so appointed must be mutually approved by the parties to this Agreement.

b. Such arbitration shall be final and binding upon both parties. Any award of the arbitrator shall be promptly complied with, and, in any event, shall be enforceable under the laws of New York.

c. All expenses shall be equally divided by the parties to this Agreement.

d. This stage of the grievance procedure shall apply only to grievances arising out of disputes concerning the meaning, interpretation or application of the terms and provisions of this Agreement without regard to Section 32.07 above.

e. All binding arbitration shall be held within the geographical boundaries of the District.

32.18 The CTA may raise a question under 17.06b, within 15 days after the action of the Board of Education in dismissing, or terminating a teacher under 17.06a by filing a written demand for an arbitration, as provided in 32.17 above. The limitation of 32.17d shall not apply to an arbitration pursuant to 17.06b.

September 11th, 1984

TO: Jerry Stone
CTA Building Representative

FROM: Joe Margolin

RE: Reading and Writing Class

As per your instructions, I am herewith stating my complaint with respect to the above captioned teaching assignment given to me for the 1984-85 school year.

I was informed in June that I was assigned to teach Reading and Writing, a course under the auspices of the English Department and not within my area of certification. Mr. Mahoney visited me and contacted me in writing of that decision at that time. I did not volunteer to teach that course.

After the commencement of classes last week, I perused the master schedule and noticed that Mrs. Buono, a teacher with less seniority in my department, is not

teaching any subject classes out of Social Studies. To the best of my knowledge she has never taught classes other than Social Studies at Commack South. Please be reminded that I was assigned to the Resource Room last year during the eighth period. As such, I was responsible to Department Chairperson Striber and therefore assigned to five periods a week out of Social Studies.

It is my understanding of the contract that the provision numbered 18.01 (k) of the contact ending June 30th, 1984 has been carried forth and that "ALL OTHER FACTORS BEING EQUAL, SENIORITY SHALL PREVAIL WITH RESPECT TO CLASS ASSIGNMENTS AND DUTIES, CLASS LOADS AND USE OR PORTABLE CLASSROOMS." I can see no reasonable circumstances that would require my assignment out of Social Studies five periods per week for the

second year in a row while a teacher with less seniority has an entire program within her area of certification.

Please be advised that I am aware that the continuity of an education program is in the best interest of all in the school. It is not my intent to create a program upheaval, although the fact that it is early in the school year would minimize problems. I am amenable to a compromise that would provide me with additional preparation time. Such a resoluation would have to take note of my generous gesture and that such a solution would never be construed by the administration to be a past practice. Such a compromise would require my direct participation in its formulation.

Please be reminded that my numerous contributions include the planning of the cultural exchange program with The

Japanese School of New York and my Moot Court Advisorship both of which are done without compensation and with my sincere desire to make Commack South a better educational institution.

I trust that I will hear from you shortly and appreciate your assistance.

Commack Teachers Association
P.O. Box 105, Commack, N.Y.
11725, (516) 724-5615

October 5, 1984

Dear Mr. Margolin:

The Executive Board of the Commack T.A. has carefully reviewed your letter of September 24, 1984. We have also acted on your request that we reconsider the decision of the Building Committee determining that your grievance was not meritorious.

Upon careful investigation of the facts and review of the informal stages, we find we are in full accord with the Building Committee's decision.

Disregarding the added fact, for the moment, that you evidently did not indicate dissatisfaction with your current assignment when it was made in June, our investigation reveals that in this

instance all other factors were not equal, and, therefore, this assignment would not be determined by seniority alone.

Very truly yours,

George Mayer

COMMACK PUBLIC SCHOOLS
COMMACK, NEW YORK

December 3, 1984

TO: Mr. Joseph Margolin
Ms. Pamela Travis-Moore
Dr. Joseph Walter

FROM: Forrest McMullen, Hearing Officer

RE: Formal Stage Grievance - Teaching Assignment of Mr. Margolin

Mr. Joseph Margolin alleges his assignment to a writing/reading course at Commack High School South (CHSS) when less senior social studies teachers were fully assigned to social studies courses violated Article XVIII, Sections 18.01 and 18.01(k) of The Agreement Between The Board of Education and The Commack Teachers Association.

It is Mr. Margolin's contention that:

1. his seniority and the junior status of five of his colleagues in the social studies department contractually required that his

schedule not include a subject outside his area of certification prior to them;

2. a more equitable and fairer rotation of assignments would exist if the five junior teachers in the department had been given a non-social studies assignment before him;
3. equitable rotation of teacher assignments is only applicable to assignments within one's area of certification;
4. administration has not identified those factors considered unequal which subordinated seniority in the determination of his assignment;
5. the general welfare of the students would have been better served by an assignment which

enabled him to continue as moot court team advisor and advisor of the cultural exchange program with the Japanese School of New York; and

6. a contractual basis for his grievance was not known my him to exist until teacher assignments were made generally known in September.

Ms. Pamela Travis-Moore, CHSS principal, contends the assignment of Mr. Margolin to a writing/reading course for which his social studies certification is applicable does not violate the Agreement as alleged.

She maintains that

1. a standard procedure for recommending teacher assignments to the principal was followed again last spring;

2. consideration was given to the expressed preferences of teachers, professional evaluations of teacher abilities in relation to student needs, teacher seniority, teacher experience in particular assignments and contractual limitations;
3. Mr. Margolin's teaching strengths, particularly the high degree of organization and structure he provides for students, were exceptionally well suited to the writing/reading course to which he was assigned;
4. department members were notified of teaching assignments in June as required by contract and opportunities to discuss dissatisfaction with teacher assignments were available at that

time; and

5. the interests of students would not be best served in the present instance by changes in assignment that would disrupt continuity of instruction and teacher-student relationships.

As hearing officer, I understand the assignments of CHSS social studies teachers for 1984-85 were made in the following context.

1. All social studies teachers assigned to CHSS last spring were invited to identify their teaching preferences for the coming school year.
2. Mr. Margolin exercised a preference for non-modified area studies and European culture studies classes.
3. Dr. Joseph Walter, social

studies department chairman, attempted to match expressed teacher preferences with projected instructional needs.

4. The number of teacher-preferred assignments to modified social studies classes did not meet projected needs.

5. The number of social studies teachers with seniority-protected job rights in the secondary tenure area exceeded district social studies needs while the number of English and mathematics teachers with seniority-protected job rights fell short of district needs.

6. Some social studies teachers volunteered for, and received, out-of-department assignments for one instructional period in

areas out of their certification.

7. Other social studies teachers volunteered for, and received, out-of-department assignments for which social studies certification was acceptable.

8. Unmet instructional needs for modified social studies classes, writing/reading classes and resource room teaching were assigned to the social studies staff in such a way that no social studies teacher had more than one such assignment involuntarily.

9. As of June, 1984, administration had assigned all social studies teachers, voluntarily or involuntarily, to one class out-of-license, one modified social studies class or one out-of-department commitment for which

their social studies certification qualified them.

10. A late-August resignation in the mathematics department and the assignment of a social studies teacher as a replacement necessitated additional social studies teacher assignments out-of-department and some changes of assignment in social studies classes.

11. The late-August changes in assignment left one social studies teacher less senioried than Mr. Margolin with a full teaching schedule within the department and with no modified social studies classes included in that schedule.

12. The less-seniored teacher's assignment was revised by adding

an additional period of psychology, a course for which she has expressed a preference, had been assigned, and had prepared, and by deleting a modified social studies class.

Article XVIII, Section 18.01(k) reads as follows:

> "All other factors being equal, seniority shall prevail with respect to class assignments and duties..."

Clearly, seniority is to be the deciding, the prevailing factor, only when all other factors are equal. Administration is required by the same Agreement to consider the welfare of children, teacher certification, teacher competency, teacher assignment to schools, the frequency of involuntary transfers, the number of teaching preparations, the number of consecutive teaching periods, maximum pupil loads,

the pattern of rotation in class assignments and other matters in addition to seniority.

Mr. Margolin's seniority is based upon the length of his continuous service, not as a social studies teacher but as a teacher in a broad secondary tenure area which includes members of the business education, English, foreign language, health, home economics, industrial arts, mathematics, science and social studies departments. His certification as a social studies teacher qualifies him to teach basic skill development courses and in resource room programs commonly assigned teachers from the secondary tenure area. Mr. Margolin's assignment to a writing/reading course was not an assignment out of his area of certification as he contends. This hearing officer rejects, as well, the contention that assignment

rotation is applicable only to social studies classes. The language of Article 18.01(b) follows directly from 18.01(a)... "the teaching assignment of a teacher shall be entirely within the area of his competency and/or certificate..." The writing/reading course, one to which Mr. Margolin has not previously been assigned, was within both his competency and certification.

Given Mr. Margolin's seniored status, was his assignment to a writing/reading class before such an assignment to less-seniored department members a violation of the Agreement.

In June 1984, all social studies teachers had been assigned at least one class either out-of-license, out-of-department, or in modified social studies. In so far as possible, known teacher preferences influenced teacher assignments.

Four of Mr. Margolin's five assignments were in accord with preferences he had earlier stated. I find no violation of the Agreement in social studies teacher assignments as of June 1984. Article 18.01(b) provides, in my judgment, full contractual support for Mr. Margolin's assignment to the writing/reading class.

In late-August 1984, some social studies teacher assignments were changed because the competencies and certification of a departing teacher and his replacement were not the same. Mr. Margolin contends the assignment of a psychology course to a less-seniored teacher at that time also violated the Agreement. I do not share that view. The principal, aware that classes were to begin in less than a week, considered available course preparation time, prior preparation and prior

teaching experience to be important factors in assigning the psychology class. She was entitled to do so in the exercise of her professional judgment. Article 18.01(b) makes provision for the consideration of factors other than seniority and for the subordination of seniority to those factors, unequally held, which favor one teacher's assignment to that of another's. Such was the case in the instance at issue.

Mr. Margolin contends, too, the general welfare of students would be best served by an assignment which permitted him to retain his association with the moot court team and cultural exchange program with the Japanese School of New York. Such a position is certainly arguable but not necessarily convincing at this time. When teacher assignments were made, the principal had

no knowledge of any pre-conditions set by Mr. Margolin for his continued association with the moot court and cultural exchange programs. Furthermore, those voluntary services were subject to continuation or termination by Mr. Margolin without regard to his teaching assignment. It is also arguable that the welfare of students was best served by utilizing Mr. Margolin's considerable talents for the writing/reading class and those of a less-seniored teacher in psychology. I am not persuaded that Article 18.01 of the Agreement was violated by the teaching assignments made by the principal.

To summarize, I find no violation of the Agreement as alleged by the grievant. Remedies are denied.

FM:sjm /s/ Forrest McMullen
cc: Mr. Julius Blaushield
Dr. Joseph J. Del Rosso
Mr. Joseph A. Heinlein

COMMACK HIGH SCHOOL SOUTH
Commack, New York

October 10, 1984

TO: Joseph Margolin

FROM: Pamela Travis-Moore

RE: Intermediate Stage Grievance re Consideration of Seniority Relative to Teaching Assignments

Joseph Margolin alleges a violation of Sections 18.01 and 18.01 k of The Agreement between the Board of Education and the Commack Teachers Association, which read as follows:

18.01 The right and responsibility of administrative personnel to make wise and judicious use of the professional staff is recognized and affirmed. In the exercise of this right, administrative personnel are to use as the prime criterion the welfare of the children placed in the teacher's charge taken together with efficient staff utilization in professional activity. To this end, the parties agree to the following:

k. All other factors being equal, seniority shall

> prevail with respect to class assignments and duties, class loads and use of portable classrooms. Such seniority rights shall be accorded to tenured teachers only and shall be based only on the total number of years teaching in the District.

It is the contention of the grievant that "seniority should prevail relative to class assignments."

It is the understanding of this writer that department chairpersons yearly follow a standard procedure in recommending teachers' programs to the building principal for scheduling purposes. Early in the spring (February-March) chairpersons survey their staff to ascertain teachers' preferences. After student enrollment figures have been determined (in March), department chairpersons then construct preliminary teacher programs based on a number of considerations: the enrollment figures, teachers' expressed

preferences, their evaluations of teachers' abilities in relation to student needs, teachers' time of experience in particular assignments, teachers' seniority in the building, and contractual limitations. While chairpersons construct preliminary programs in early spring (March-April), and make recommendations accordingly to the building principal, typically those programs are altered and adjusted as staff allocations are finalized in May and June. All teachers are notified of their program assignments, and specific teaching scheduled for the next year, as recommended by their chairperson and approved by their principal, by June 10, in accordance with Article XVIII, Section 18.01 j of the Agreement. Dr. Joseph Walter, Social Studies Chairperson at Commack High School South, acted in accordance with established

procedures (outlined above) and in full compliance with Section 18.01 of the Agreement, in recommending the specific teaching program of social studies teachers to the building principal for approval, and in notifying all social studies teachers of their teaching schedules in accordance with the Agreement.

Because a number of factors are considered in the determination of teaching programs in order "to make wise and judicious use of the professional staff and because Dr. Walter, specifically recommending the teaching programs for his social studies teachers using "as his prime criterion the welfare of the children placed in the teacher's charge taken together with efficient staff utilization in professional activity," it is the opinion of this writer that all factors were not equal in this instance and that, therefore,

seniority does not prevail in the determination of the teaching program of Joseph Margolin for the 1984-85 academic year. The grievance is denied at the Intermediate Stage.

PJT-M:fb

cc: Leonard Berkman, Chief Building Representative
Commack Teachers' Association

COMMACK HIGH SCHOOL SOUTH
Commack, New York

September 26, 1984

TO: Mr. J. Margolin

FROM: Dr. J. Walter, Social Studies Chairperson

RE: Grievance Filed September 25, 1984- Informal Stage

Pursuant to our meeting of yesterday (September 25, 1984), I am recommending that no changes in your 1984-85 teaching schedule be made.

With regard to Sections 18.01 and 18.01(k) of the "Agreement Between the Board of Education of Commack Union Free School District and the Commack Teachers Association," I feel that I made wise and judicious use of the entire Social Studies Department staff in recommending the specific program for each teacher, in addition to making an effort every year to rotate assignments on an equitable and fair basis.

JW:fb

EXTRACT FROM VERIFIED ANSWER INTERPOSED BY COMMISSIONER OF EDUCATION IN SUPREME COURT OF ALBANY COUNTY - October 30th, 1985

FOURTH: Denies the allegations appearing in those paragraphs of the petition denominated "THIRTEENTH", "FIFTEENTH" and "SIXTEENTH", and respectfully submits that the asserted "harmonious relationship" to the extent it depends upon school district administrators assigning staff on a rotating basis with the concurrence of the union and to the extent it purports to be done without regard to the necessity that teachers be certified for the subjects they are assigned to teach, is patently a violation of Education Law section 3001 and, indeed, payment of salary to teachers assigned outside of their certification area is postscribed by Education Law section 3009 and subjects the members of the board of education - the at least nominal petitioner herein, to the penalty specified in section 3010.

EXTRACT FROM THE PETITION OF APPEAL OF JOSEPH B. MARGOLIN TO THE COMMISSIONER OF EDUCATION DATED DECEMBER 24TH, 1984

District Superintendent being appealed from herein.

FIFTEENTH: That following the union's unwarranted refusal to proceed as aforesaid, your petitioner was left with no other contractual remedy except to present his grievance through the Informal, Intermediate, and Formal internal stages pursuant to the grievance machinery provided for in the said Article XXXII of the contract.

SIXTEENTH: In pursuance thereof your petitioner orally presented his grievance to his immediate supervisor, Dr. Joseph Walter, as provided for in the Informal Stage under Section 32.16(a) of the contract.

SEVENTEENTH: Dr. Walter denied the grievance in his communication to the petitioner dated September 26, 1984. A

EXTRACT FROM THE PETITION OF APPEAL OF JOSEPH B. MARGOLIN TO THE COMMISSIONER OF EDUCATION DATED DECEMBER 24TH, 1984

copy thereof is annexed hereto and made part hereof and marked Exhibit "F".

EIGHTEENTH: As provided for in the Intermediate Stage your petitioner presented his grievance in writing to his principal requesting a meeting resulting from the denial of petitioner's grievance. That annexed hereto and made part hereof and marked Exhibit "G" is a copy of the communication dated September 26, 1984 requesting such meeting.

NINETEENTH: That a meeting was held with the principal as part of the intermediate Stage on October 5, 1984. Theprincipal again denied the grievance. Annexed hereto and made part hereof and marked Exhibit "H" is a copy of the communication dated October 10, 1984 again denying the grievance.

EXTRACT FROM THE PETITION OF APPEAL OF JOSEPH B. MARGOLIN TO THE COMMISSIONER OF EDUCATION DATED DECEMBER 24TH, 1984

TWENTIETH: As provided for in the Formal Stage of the grievance machinery your petitioner requested the District Superintendent to review and determine the grievance and denial thereof. Annexed hereto and made a part hereof and marked Exhibit "I" is a copy of petitioner's communication dated October 15, 1984.

TWENTY-FIRST: That following the hearings the District Superintendent by his designee, Assistant Superintendent Forrest McMullen, denied the grievance. Annexed hereto and made part hereof and marked Exhibit "J" is the communication dated December 3, 1984 denying your petitioner's grievance and from which determination the appeal herein is taken.

TWENTY-SECOND: That the fourth stage of the grievance machinery, that of external arbitration by the Public

EXTRACT FROM THE PETITION OF APPEAL OF JOSEPH B. MARGOLIN TO THE COMMISSIONER OF EDUCATION DATED DECEMBER 24TH, 1984

Employment Relations Board is not available to the petitioner for no right whatsoever is accorded the aggrieved petitioner by the terms of the said collective bargaining agreement. It is at least questionable whether the three (3) stages of the grievance machinery afforded justice and equal protection for the petitioner.

Properly and fairly analyzed arbitraton under the collective bargaining agreement must be characterized as an integral part of the grievance procedure. 1 Although arbitration could not be sought prior tothe exhaustion of stages one, two and three procedures provided for in the collective bargaining agreement, your petitoner then finds himself barred from arbitration because stage No. 4 is not available to him. Accordingly the only external forum in which his grievance may

EXTRACT FROM THE PETITION OF APPEAL OF JOSEPH B. MARGOLIN TO THE COMMISSIONER OF EDUCATION DATED DECEMBER 24TH, 1984

be reviewed is by the Commissioner of Education to whom this appeal is being made. The teacher has no other alternative but to pursue both remedies concurrently and vigorously because his grievance in the first stage is heard by the department chairman who made the assignment complained of, and in the second stage the petitoner seeks a review by the principal who expressly or by implication approved the assignment made by her subordinate, and in stage No. 3 the petitioner seeks a review of the actions taken to the District Superintendent, who has supervisory responsibility over both of the subordinates whose actions already taken by them are deemed to have been approved by him. These internal stages do not afford the petitioner sufficient protection. When the fourth and only external stage of

EXTRACT FROM AFFIDAVIT OF COMMACK SCHOOL DISTRICT IN SUPPORT OF ARTICLE 78 PETITION IN SUPREME COURT OF ALBANY COUNTY

it is "undeniable that petitioner [Margolin] has pursued his available remedy to the extent possible and may now seek relief in this forum" (Exhibit F, at 2), is directly contrary to well-settled precedent of both the federal and state courts, as well as that of the Commissioner himself. Vaca v. Sipes, 386 U.S. 171 (1967); Berlyn v. Bd. of Ed., 80 A.D.2d 572 (2d Dep't 1981) aff'd. 55 N.Y.2d 912 (1981); Matter of Whyte, 19 Ed.Dep.Rep. 23 (1979); Matter of Renos, 23 Ed.Dep.Rep. ____, Decision No. 11410 (February 23, 1985). The law is clear that an employee is not deemed to have exhausted his contractual remedies unless a union's determination not to carry a grievance to its final stages is proven to be a breach of its duty to fairly represent the employee. Rieder v. State University of New York, 47 A.D.2d 865 (2d Dep't 1975) aff'd. 39 N.Y.

2d 845 (1976); Menkes v. City of New York, 91 A.D.2d 654 (2d Dep't 1982). It is also clear that unions must be "free to sift out wholly frivolous grievances which would only clog the grievance process." Humphrey v. Moore, 375 U.S. 335, 349-350 (1964). See, Matter of Civil Service Bar Association, Local 237 v. City of New York, 64 N.Y.2d 188 (1984).

3. The above policy, as well as the policy of promoting harmonious and stable labor relations by encouraging the creation of internal grievance procedures to resolve contractual disputes, will be severely undercut if disgruntled employees, whoe grievance is found not to merit arbitration by their own union, are allowed to bypass their exclusive contractual remedies by seeking the review of a "super-arbitrator," to wit, the Commissioner of Education. The

EXTRACT FROM VERIFIED ANSWER OF JOSEPH B. MARGOLIN IN ARTICLE 78 PROCEEDING IN SUPREME COURT OF ALBANY COUNTY

Respondent filed his grievance claiming that Social Studies teachers less senior to him had not first been involuntarily assigned to the non-Social Studies classes referred to in paragraph numbered "FIRST" hereof, and therefore such assignments violated the terms of subdivision "k" of Article 18.01 of the said agreement providing as follows:

> "All other factors being equal, seniority shall prevail with respect to class assignments and duties, class loads and use of portable classrooms. Such seniority rights shall be accorded to tenured teachers only on the total number of years teaching in the District."

THIRD: Denies each and every allegation set forth in paragraph numbered "SIXTH" of the Petition except admits that his grievance was denied at each of the first three stages of the contract's grievance procedure.

FOURTH: Denies each and every

EXTRACT FROM VERIFIED ANSWER OF JOSEPH B. MARGOLIN IN ARTICLE 78 PROCEEDING IN SUPREME COURT OF ALBANY COUNTY

allegation set forth in paragraph numbered "SEVENTH" of the Petition except admits that the Union declined to prosecute the grievance on Respondent's behalf including their declination to initiate the arbitration stage of the grievance procedure.

FIFTH: Denies each and every allegation in paragraph numbered "EIGHTH" of the Petition except admits that the Respondent instituted his appeal to the Commissioner pursuant to Education Law Section 310, claiming that his involuntary assignment to the "Writing and Reading" class and "Resource Room" are in violation of the contract and claiming further that the denial of his grievance at all three internal stages of the grievance process failed to afford justice and equal protection to the Respondent.

SIXTH: Denies each and every allegation set forth in paragraph numbered

EXTRACT FROM AFFIDAVIT OF JOSEPH B. MARGOLIN IN SUPPORT OF ANSWER AND IN OPPOSITION TO PETITION

17. Your deponent thereupon made use of his statutory remedy and appealed to the Commissioner at the only external forum in which his grievance may be reviewed. Surely, the existing contract machinery does not afford justice and equal protection to your deponent when during the first stage, his grievance is heard by the very department chairperson who made the assignment complained of, and in the second stage the denial of his grievance is reviewed by the principal of the school who expressly or by implication approved the assignment made by her subordinate and in the third stage her affirmance of the denial of my grievance is thereupon reviewed by the District Superintendent who has supervisory responsibility over both of his subordinates, whose actions already taken by them, are deemed to have been approved by him.

of the Respondent is irrelevant. The claims of the considerations of the welfare of children and the Petitioner's most efficient and professional use of staff are no justification for the diminution of the seniority rights of the Respondent. Rotation of class assignments is strictly administrative and may not be used by the Petitioner to make an involuntary assignment to the Respondent before giving that assignment to other teachers less senior to him. The Petitioner's determination that these reasons outweigh the Respondent's superior seniority status is to no avail. The seniority status of the Respondent is in the nature of the property right contractually provided for and should not be summarily taken from him by the Petitioner.

25. The emotional appeal made in paragraph numbered "12", of that

EXTRACT FROM AFFIDAVIT OF JOSEPH B. MARGOLIN IN SUPPORT OF ANSWER AND IN OPPOSITION TO PETITION

the contractual grievance process has in no wise or manner, been impeded by these proceedings. On the contrary, it has reinforced the authority of the grievance process but has reiterated the need for the fair, just, and impartial compliance with the provisions of the Collective Bargaining Agreement. The Agreement is essential and indispensable, but it must be adhered to with due process.

The Writing-Reading Program-Ninth Grade-A Description

The Writing-Reading program is supervised by the English Department chairperson and is generally staffed by English teachers.

The program provides on-grade level (9th grade) instruction to students in the areas of reading, writing, listening, and thinking skills as well as in organizational skills such as note taking, budgeting time, use of the library and other skills.

Some students will meet three days a week during one semester and others will meet two days a week. At the end of the 1st semester, those who attended for three days will then go for two, and vice versa. The same switching and dovetailing will occur with physical education.

Students will receive a pass-fail

Sept. 24, 1984

To: Joseph B. Margolin

From: Gerald B. Stone,
CTA Building Representative

Dear Joe,

The CHSS Building Committee does not find your grievance to be meritorious but will gladly help to protect your rights under Article 32 of the current CTA Agreement with the Board of Education. Furthermore, the committee recommends that you carefully read Article 32.10 of the aforementioned agreement. Please do not hesitate to contact me at any time.

Yours truly,

Jerry Stone

> we are dismissing the action without prejudice to a renewal of proceedings upon a showing that the union has failed to properly represent plaintiffs' interests through steps 3 and 4 of the grievance procedure.

Id. at 867. Thus, Rieder clearly stands for the proposition that an employee is not deemed to have exhausted its contractual remedies unless a union's determination not to carry a grievance to its final stages is proven to be a breach of its duty to fairly represent.

The Commissioner of Education, in the Matter of Malcolm Arthur Whyte, 19 Ed Dep't Rep 23,24 (1979), has expressly adopted the holding in Rieder, as well as the more general proposition, that an employee may not seek review of an employer's construction of a collective-bargaining agreement outside the internal contractual grievance procedure absent a showing that the employee's union has

failed to provide fair representation.

The Whyte case similarly involved an employee whose grievance had been denied at the various steps of the contractual grievance proceedings. The final step remaining, arbitration, could only be initiated by the union. The employee petitioned the Commissioner, pursuant to section 310 of the Education Law, to review the merits of his grievance and the respondent school district raised the defense that the contractual remedies available had not been exhausted. The Commissioner found that petitioner had not exhausted the contractual grievance procedure, since the union had in fact instituted a step 3 review and there was no reason to believe that the union would automatically refuse to initiate arbitration. The Commissioner went on to state (emphasis added):

EXTRACT FROM BRIEF OF JOSEPH B. MARGOLIN SUBMITTED TO APPELLATE DIVISION 3RD DEPT.

Margolin had no other alternative but to seek an external review of his grievance following the unsuccessful exhaustion of stages one, two and three of the grievance machinery provided for in the collective bargaining agreement. The internal stages did not afford Margolin sufficient protection because his grievance in the first stage was heard by the Social Studies Department Chairperson who made the assignment complained of, and in the second stage Margolin sought a review by the principal who expressly or by implication approved the assignment made by her subordinate, and in stage No. 3 thereof sought a review of these actions by the District Superintendent who exercised supervisory responsibility over both of the subordinates whose actions already taken by them are deemed to have been approved or confirmed by him.

EXTRACT FROM PAGE NO. 10 OF THE BRIEF OF JOSEPH B. MARGOLIN SUBMITTED TO COURT OF APPEALS

These stages did not afford Margolin due process because his grievance in the first stage was heard and denied by the Social Studies Department Chairperson who made the assignment complained of, and in the second stage Margolin sought a review and reversal thereto by the principal who expressly or by implication approved the assignment made by her subordinate, and in stage No. 3 thereof sought a review and disaffirmance of these actions by the District Superintendent who exercised supervisory responsibility over both of the said subordinates whose actions complained of must be deemed to have been ratified, approved and confirmed by him.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, Section 1 of the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article V, Section 4 of the Constitution of the State of New York provides in pertinent part:

> The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department. * * * Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.

Article XI, Section 2 of the Constitution of the State of New York provides in pertinent part:

> The corporation created in the year one thousand seven hundred eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature,

> shall be exercised by not less than nine regents.

N.Y. Educ. Law Sec. 305 provides in pertinent part:[8]

> The commissioner of education is hereby charged with the following powers and duties:
>
> 1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.
>
> 2. He shall have general supervision over all schools and institutions which are subject to the provisions of this chapter, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control.

---

[8] Sec. 305 subd. "2" was modified in 1987. The section, as indicated above, was in effect at the time the Commissioner of Education rendered his decision in the case at bar.

N.Y. Educ. Law Sec. 310 provides:

> Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action:
>
> 1. By any school district meeting.
>
> 2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.
>
> 3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.
>
> 4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.
>
> 5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

6-a. By a principal, teacher, owner or other person in charge of any school in denying a child admission to, or continued attendance at, such school for lack of proof of required immunizations in accordance with section twenty-one hundred sixty-four of the public health law.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

N.Y. Educ. Law Sec. 309 provides:

The schools of every union free school district and of every city in all their departments shall be subject to the visitation of the commissioner of education. He is charged with the general supervision of their boards of education and their management and conduct of all departments of instruction.

N.Y. Educ. Law Sec. 311 provides in pertinent part:

The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

N.Y. Educ. Law Sec. 207 provides in pertinent part:

> Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department. * * * Rules or regulations, or amendments or repeals thereof, adopted or prescribed by the commissioner of education as provided by law shall not be effective unless and until approved by the regents, except where authority is conferred by the regents upon the commissioner of education to adopt, prescribe, amend or repeal such rules or regulations.

N.Y. Educ. Law Sec. 1711 provides in pertinent part:

> 2. In any union free school district having a population of four thousand five hundred or more, meeting the enumerated standards established pursuant to subdivision one, determined by the commissioner of education, as herein provided, the board of education may appoint a superintendent of schools.
>
> 3. Such superintendent shall be under

> the direction of the board of education, which shall prescribe his powers and duties, except as otherwise provided in subdivision four of this section. He shall be paid a salary, to be fixed by the board of education, and he may be removed from office by a vote of the majority of all the members of such board, provided, however, that a board of education may enter into a contract with such superintendent for a period of not less than three and not more than five years, and upon such other terms as shall be mutually acceptable to the parties, including but not limited to, fringe benefits and procedures for termination by either party prior to the expiration of the term of such contract.

N.Y. Administrative Procedure Act Sec. 100 provides in pertinent part:

> This act guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law. It insures that equitable practices will be provided to meet the public interest.

N.Y. C.P.L.R. provides in pertinent part:

> Rule 4511. Judicial notice of law
> (a) When judicial notice shall be taken without request. Every court shall take judicial notice without request of the common law, consti-

> tutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

N.Y. Statutes Sec. 351 provides in pertinent part:

> The courts of New York will take judicial notice of the public statutes of the state, and in actions brught thereunder, such statutes need not be pleaded.

N.Y. Educ. Law Sec. 3001 provides in pertinent part:

> Qualification of teachers. No person shall be employed or authorized to teach in the public schools of the state who is:
>
> 2. Not in possession of a teacher's certificate issued under the authority of this chapter or a diploma issued on the completion of a course in a state college for teachers or state teachers college of this state.

N.Y. Educ. Law Sec. 3009 provides in pertinent part:

> Unqualified teachers shall not be paid from school moneys.
>
> 1. No part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary, or any part thereof, be collected by a district tax except a provided in this chapter.

N.Y. Educ. Law Sec. 3010 provides in pertinent part:

> Penalty for payment of unqualified teacher.
>
> Any trustee or member of a board of education who applies, or directs, or consents to the application of, any district money to the payment of an unqualified teacher's salary, thereby commits a misdemeanor; and any fine imposed upon him therefor shall be for the benefit of the common schools of the district.

N.Y. C.P.L.R. Sec. 7803 Sec. 3 provides in pertinent part:

> The only questions that may be raised in a proceeding under this article are:
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error

> of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

8 NYCRR 30.1(f) provides:

> Seniority means length of service in a designated tenure area, rather than length of service in the district; such service need not have been consecutive but shall during each term for which seniority credit is sought, have constituted a substantial portion of the time of the professional educator.

8 NYCRR 30.1(h) provides:

> Tenure area means the administrative subdivision within the organizational structure of a school district in which a professional educator is deemed to serve in accordance with the provisions of this Part.

8 NYCRR 80.2(c) provides:

> Incidental teaching. A superintendent of schools, with the approval of the Commissioner of Education, may assign a teacher to teach a subject not covered by license for a period not to exceed five classroom hours a week.

Supreme Court, U.S.
FILED
APR 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1381

In the

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH B. MARGOLIN,

Petitioner,

v.

BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

EUGENE L. WISHOD
Attorney for Respondent
534 Broadhollow Road, CB-179
Melville, New York 11747
(516) 694-2300

ROBERT H. COHEN
Of Counsel

Questions Presented

1. Was petitioner's vague and generic use of terms such as "due process" and "equal protection" sufficient to have raised a substantial federal question within the State Court proceedings where the petitioner never made specific reference to the Federal Constitution as opposed to the Constitution of the State of New York, and the State Courts, including the Court of Appeals, failed to pass upon a Federal constitutional question?

2. Does the New York State Court of Appeals' determination that a member of a public sector employees' union may not individually enforce a substantive provision of the collective bargaining agreement by way of an appeal to the State Commissioner of Education, absent a showing that the union breached its duty of fair representation, deny that union member equal protection or due process of law under the Federal Constitution?

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In the

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH B. MARGOLIN,

Petitioner,

v.

BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Jurisdiction

The jurisdiction of this Court is *not* invoked pursuant to 28 U.S.C. §1257(3) because no question of federal law is presented herein.

Statutes Involved

It is respondent's position that no federal constitutional provisions or statutes are involved. The only State statute involved in the case that was omitted by petitioner is N.Y. Civil Service Law §§200 *et seq.* (McKinney, Volume 9).

Statement of the Case

Petitioner is a tenured teacher employed by the respondent (2a).[1] Pursuant to the provisions of the collective bargaining agreement (the "Contract") entered into by the

[1] Numbers followed by the small letter "a" in parentheses refer to the appendix to the Petition for Writ of Certiorari.

respondent and the Commack Teachers' Association (the "Union"), the duly recognized and acting collective bargaining representative for all teachers employed by respondent, petitioner filed a grievance claiming that his seniority was not properly considered within the context of a class assignment (75a). Specifically, petitioner alleged that his assignment to teach one class a week outside of his normal subject area of social studies, rather than assigning a less senior teacher, violated Article XVIII of the Contract, which provides in part (67a):

> All other factors being equal, seniority shall prevail with respect to class assignments and duties . . . .

At each of the three steps in the grievance process, petitioner's grievance was denied on the basis that there were factors other than seniority which favored less senior teachers and, therefore, the challenged assignment was made in accordance with Article XVIII of the Contract (81a-100a). The Union, after an independent investigation, found petitioner's grievance to be without merit and declined to invoke the arbitration stage of the internal grievance procedure (79a-80a). Under the terms of the Contract, only the Union could demand the arbitration of a grievance (72a).

Having failed to obtain relief within the context of the Contract's internal grievance procedure, petitioner instituted an appeal to the New York State Commissioner of Education (the "Commissioner"), pursuant to §310 of the State *Education Law* (102a-106a). In his petition to the Commissioner, petitioner presented the same arguments he had unsuccessfully made both to the District and his own Union during the various stages of the grievance (8a-9a). Essentially, he sought to individually enforce a substantive contractual provision outside of the internal grievance machinery provided for in the very same contract.

In its Answer before the Commissioner, respondent, *inter alia*, raised as an affirmative defense the fact that petitioner had failed to allege that the determination of the Union not to carry the grievance to arbitration constituted a breach of its duty to fairly represent the petitioner (9a-10a).

By Decision dated April 30, 1985, the Commissioner sustained petitioner's appeal, holding that petitioner could individually enforce Article XVIII of the Contract by means of an administrative appeal to the Commissioner of Education (55a-64a).

The respondent thereafter commenced a special proceeding pursuant to Article 78 of the *Civil Practice Law and Rules* of the State of New York, seeking to annul the Commissioner's determination. The Supreme Court of Albany County dismissed the proceeding without opinion (51a). A sharply divided panel of the Appellate Division, Third Department (3 to 2) affirmed (27a-47a). The New York State Court of Appeals unanimously reversed the Appellate Division's dismissal of the Article 78 Petition and annulled the challenged determination of the Commissioner of Education (1a-26a). In doing so, the Court of Appeals held that (1a-2a):

> A teacher alleging breach of a provision of the collective bargaining agreement between the school district and the union, having exhausted the grievance process established by the agreement and claiming no breach of the union's duty of fair representation, cannot then petition the Commissioner of Education under Education Law §310 for relief on that same grievance.

In short, the Court concluded that "without a showing that the Union breached its duty of fair representation in prosecuting [the] grievance," petitioner could not resort to

"additional remedies" outside of the internal grievance process to enforce a substantive right under the Contract. (23a-24a).

Petitioner now seeks a Writ of Certiorari to review the determination of the New York State Court of Appeals.

REASONS FOR DENYING THE WRIT

POINT I

This Court lacks jurisdiction to entertain the present petition because no federal question was raised below.

Petitioner failed to raise within the State Court proceedings any question involving a Federal Constitutional Provision or Statute. Indeed, the New York State Court of Appeals did not pass upon a federal question, but based its decision solely upon an interpretation of State law. For these reasons, which are more fully set forth below, the petition must be dismissed for want of federal jurisdiction.

A. Petitioner's vague use of generic terms such as "due process" and "equal protection" in his State Court pleadings were insufficient to raise a *bona fide* federal question.

It is well settled that in order for this Court to have jurisdiction to review a determination of a State's highest Court, "some provision of the Federal, as distinguished from the State, Constitution [must be] relied upon, and such provision must be set forth." *New York Central and H.R. Co. v. New York*, 186 U.S. 269, 273 (1902). Thus, if a petitioner claims that a State Statute is "unconstitutional" or that it violates "equal protection" and/or "due process", it will be assumed that reference is being made to the State Constitution and rights thereunder rather than to the Federal Constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928). This is especially true

where, as here, the applicable State Constitution contains a due process clause and an equal protection clause. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914).

In the present case, petitioner used terms such as "due process" and "equal protection" in their generic sense and did not specifically delineate that he was claiming a violation of the Federal Constitution as opposed to the State Constitution. For example, in Paragraph Twenty-Second of his petition to the Commissioner of Education, petitioner makes the vague assertion that "it is at least questionable whether the three stages of the grievance machinery afforded justice and equal protection for the petitioner." (105a). Since the New York State Constitution contains both an equal protection clause (Article I, Section 11) and a due process clause (Article I, Section 6), such allegations must be presumed to implicate the New York State Constitution, if they are sufficient to raise a Constitutional claim at all.

The fact that the New York State Court of Appeals failed to address a Federal Constitutional issue further points up petitioner's failure to properly raise such an issue in the State Court proceedings. It is well settled that when the highest State Court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the burden of showing that the federal question was in fact properly raised, so that the State Court's failure to deal with it was not for want of proper presentation. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983). As this Court stated in *Street v. New York*, 394 U.S. 576, 582 (1969), when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." In view of petitioner's vague illusions to "equal protection" and "due

process" (110a, 113a), it is not surprising that the New York State Court of Appeals failed to perceive *any* Constitutional issue, let alone one implicating a federal question.

B. This Court lacks jurisdiction because the New York State Court of Appeals decided only issues of State Law.

As stated earlier, the New York State Court of Appeals did not pass upon any federal issues, but reached the subject determination through its construction of applicable State Law. Specifically, the Court of Appeals balanced the provisions of the *Civil Service Law* which encourage public employers and unions to resolve labor disputes through contractual grievance procedures against the provisions of the *Education Law* which grant the Commissioner of Education broad jurisdiction in reviewing actions of local school officials. In this regard, the Court of Appeals held (18a-19a):

> It is the policy of this State "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law §200). This policy is "best effectuated" by "encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes." (Civil Service Law §200[c]). The Taylor Law further grants to public employees the right to be represented by unions to negotiate the terms and conditions of their employment "and the administration of grievances arising thereunder." (Civil Service Law §203) . . . . Permitting employees to prosecute alleged violations of the agreement beyond the contractual grievance procedure obviously unsettles the finality of grievance determinations that are central to implementation of

State policy, and the right to bring such proceedings is therefore restricted.

The Court of Appeals turned next to the "relation of these principles to the broad powers granted the Commissioner under the Education Law" (19a), and determined that the Commissioner's "broad review powers are not, however, unlimited" (22a). The Court concluded that allowing the Commissioner of Education to act as a "super arbitrator" pursuant to §310 of the *Education Law* would severely undercut "the Civil Service Law objective underlying collective bargaining in public sector employment" (23a). Thus, individual employees were barred from enforcing substantive provisions of the collective bargaining agreements through appeals to the Commissioner, absent a showing that the union breached its duty of fair representation (23a-24a).

It is evident from the foregoing that this case is bereft of any federal issues and is simply just not the type of case which falls within this Court's limited appellate jurisdiction.

POINT II

Assuming, *arguendo*, that this Court does possess jurisdiction pursuant to 28 U.S.C. §1257(3), the New York State Court of Appeals' determination is not violative of petitioner's constitutional right to equal protection and due process of law.

In the present case, the New York State Court of Appeals held that a union's decision to conclude the grievance process short of the final step allowed by contract, must be binding upon the employee, absent a breach of the union's "duty of fair representation in prosecuting the employee's grievance." (23a).

It is petitioner's contention that by barring him from enforcing substantive Contract provisions outside the pro-

cedural mechanisms contained in the Contract, the Court of Appeals deprived him of a property interest without due process of law, and denied him equal protection under the law. However, in reaching its determination, the Court of Appeals borrowed heavily from Federal Labor Law policy which strongly favors the finality of internal grievance procedures (15a-17a). Citing this Court's decisions in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) and *Teamsters Local v. Lucas Flower Co.*, 369 U.S. 95, 103 (1964), the Court of Appeals recognized that an individual employee gives up to his union, as his representative, his individual right to enforce the collective bargaining agreement. The Court of Appeals also cited this Court's decision in *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967), where the Court explained the dangers of affording an individual union member the absolute right to compel arbitration or seek redress in an alternative forum as follows:

> . . . The settlement machinery provided by the contract will be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. (Citations omitted). It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L.M.R.A. §203(d).

Thus, the public policy considerations adopted by the Court of Appeals have been sustained numerous times by this Court.

Additionally, petitioner was afforded procedural due process, in that he was given an opportunity to be heard, to present evidence, and received a written decision based upon the evidence presented at each step of the grievance process. The Union's refusal to take the grievance to arbitration did not deprive petitioner of procedural due process. Both the New York State Court of Appeals in the decision below, and this Court in the *Vaca* case, recognized the potential problem of union misconduct and provided an escape valve from the internal grievance process by allowing an employee to individually seek enforcement of his contractual rights only when he has been "prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." (Emphasis in original). *Id.*, 386 U.S. at 185. It should be noted that the petitioner did not allege before the Commissioner that his union had breached its duty to fairly represent him. However, petitioner did commence a separate proceeding before the New York State Public Employment Relations Board ("PERB") alleging that the Union had violated its duty of fair representation. After an evidentiary hearing, this claim was rejected by PERB. *Matter of Commack Teachers Association*, 19 PERB 3019, *aff'd* ___ A.D.2d ___, 520 N.Y.S.2d 226 (3rd Dept. 1987). Petitioner has received all the legal process that is due him and only submits this petition because he is dissatisfied with the results obtained.

In sum, the initial three stages of the internal grievance process, coupled with the administrative review of the Union's determination not to invoke arbitration, adequately provided petitioner with the procedural due process and equal protection required by the United States Constitution. This Court has consistently sustained the current Federal system governing collective bargaining and labor relations. There is thus no need for it to review a State system which is modeled upon the Federal.

CONCLUSION

For the reasons stated above, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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